

Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences

ROSELLE L. WISSLER*

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*Research Director, Lodestar Dispute Resolution Program, Sandra Day O'Connor College of Law at Arizona State University (rwissler@asu.edu). The author thanks Wayne Brazil, Bob Dauber, Art Hinshaw, Craig McEwen, Robert Rack, and Nancy Rogers for their comments on an earlier draft and thanks Amy Levine and Serene Rock for their assistance. The views expressed are solely those of the author.

I. INTRODUCTION

Court efforts to facilitate settlement in civil cases, whether through judicial settlement conferences or court-connected mediation and other alternative dispute resolution (ADR) processes, have become commonplace. With the 1983 revisions to Rule 16 of the Federal Rules of Civil Procedure, “settlement” explicitly became an appropriate topic for discussion during judicial pretrial conferences.¹ By the late 1990s, all federal appellate courts, a majority of federal trial courts, and many state trial and appellate courts had mediation programs.²

Several models of judicial settlement conferences and court-connected mediation are commonly used in general civil cases. The primary distinguishing feature among the two main models of judicial settlement conferences is the role that the judge who conducts the conference plays in other aspects of the case. In one model, the assigned trial judge conducts the settlement conference.³ In the other model, a judge other than the trial judge

¹ ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 6, 20–28 (1996) (reporting that most district courts had judicial settlement conference programs, and that approximately 40% of the courts routinely used these programs); James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 DISP. RESOL. MAG. 11, 11–12 (1999); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 490–93 (1985); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 612–15 (2005); Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 345 (2006) (finding that virtually all surveyed California general civil trial court judges conducted settlement conferences and that most conducted up to five settlement conferences per week).

² See ALTERNATIVE DISPUTE RESOLUTION ACT OF 1998, 28 U.S.C. § 652(a) (2000) (requiring federal courts to implement ADR programs or improve existing programs); SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE § 5.3 (2d ed. 2009); ROBERT J. NIEMIC, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 4 (2d ed. 2006); PLAPINGER & STIENSTRA, *supra* note 1, at 3–4, 15–17; Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”*, 1 J. OF EMPIRICAL LEGAL STUD., 843, 849–50 (2004).

³ See, e.g., ROBERT NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 78–80 (2001); PLAPINGER & STIENSTRA, *supra* note 1, at 6, 20–28; Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, 35 LITIG. 17, 18 (Spring 2009); Resnik, *supra* note 1, at 641; Robinson, *supra* note 1, at 346, 367.

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conducts the settlement conference.⁴ Some courts use both models; which one is used in a given case may depend on whether the case will be tried before a judge or jury or whether the parties have consented to a settlement conference with the judge assigned to the case or requested another judge.⁵

The models of court-connected mediation are distinguished primarily by the mediators' relationships to the court, whether the mediators receive compensation, and whether the litigants pay for mediation.⁶ The court staff mediator model is used in most appellate court mediation programs and a few trial court programs.⁷ Under this model, the court hires the mediators as court staff⁸ and offers mediation to litigants at no charge.⁹ A second model, used in most of the remaining general civil court mediation programs, involves a court-developed and administered roster of approved mediators to whom the court refers cases.¹⁰ The mediators serve partly or entirely *pro bono* in some courts, but receive compensation from the court or the parties

⁴ See, e.g., PLAPINGER & STIENSTRA, *supra* note 1, at 6, 20–28; Killefer, *supra* note 3, at 18; Resnik, *supra* note 1, at 641 n.187; Robinson, *supra* note 1, at 346, 367.

⁵ See *infra* notes 25, 31.

⁶ See COLE ET AL., *supra* note 2, § 6:12; Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 745–50 (1999); Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 20–22 (Donna Stienstra & Susan M. Yates eds., 2004); John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 850 (1999); Robert Rack & Nancy H. Rogers, *Introduction*, 14 OHIO ST. J. ON DISP. RESOL. 711, 712 (1999).

⁷ See NIEMIC, *supra* note 2, at 12–13; PLAPINGER & STIENSTRA, *supra* note 1, at 9; Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 64, 73 (2004).

⁸ The line between court staff mediation and judicial settlement conferences is blurred when sitting judges, including judges assigned to the case, conduct “judicial mediations” or “judicial settlement conferences” using traditional mediation techniques. See PLAPINGER & STIENSTRA, *supra* note 1, at 18–19; Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131, 137–44 (2001); Louise Otis & Eric H. Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L.J. 351, 352 (2006); Robinson, *supra* note 1, at 348–51; Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, in ADR HANDBOOK FOR JUDGES 297, 305–06 (Donna Stienstra & Susan M. Yates eds., 2004).

⁹ See NIEMIC, *supra* note 2, at 12–13; Brazil, *supra* note 6, at 747; McAdoo & Welsh, *supra* note 6, at 20–21; McCrory, *supra* note 6, at 813 n.2.

¹⁰ See NIEMIC, *supra* note 2, at 13; PLAPINGER & STIENSTRA, *supra* note 1, at 9, 36–49, 55; McAdoo & Welsh, *supra* note 6, at 20–21.

in most courts that use this model.¹¹ Models in which the court refers cases to individual private mediators or to an organization that provides the mediators and administers the program, are used infrequently in general civil cases.¹²

There is a lack of empirical research examining the different models of mediation and judicial settlement conferences.¹³ Several studies in the 1980s examined lawyers' views of judges' involvement in facilitating settlement; that research, however, focused on the approaches and techniques judges used rather than on comparisons between settlement conference models.¹⁴ Moreover, because those studies were conducted shortly after settlement became an explicit topic for discussion in pretrial conferences, those findings might not be applicable to judicial settlement conferences as currently conducted. Another study compared volunteer mediation with early settlement conferences with a magistrate judge¹⁵ but did not examine different models of mediation or "traditional" settlement conferences.

The present Article reports the findings of a survey that provides a rare look at how lawyers view several models of judicial settlement conferences and mediation, based on their experience with the procedures in federal court. The findings show that lawyers tended to view mediation with staff mediators more favorably than mediation with volunteer mediators and both

¹¹ See PLAPINGER & STIENSTRA, *supra* note 1, at 10–11, 36–49; NIEMIC, *supra* note 2, at 13; McAdoo & Welsh, *supra* note 6, at 20–21; Wissler, *supra* note 7, at 64. Some courts set or limit the mediators' fees; other courts allow the mediators to charge market rates. See PLAPINGER & STIENSTRA, *supra* note 1, at 10–11, 36–49; McAdoo & Welsh, *supra* note 6, at 20–21.

¹² See PLAPINGER & STIENSTRA, *supra* note 1, at 9; McAdoo & Welsh, *supra* note 6, at 10, 20; Rack & Rogers, *supra* note 6, at 712.

¹³ See, e.g., Brazil, *supra* note 6, at 720, 777; John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 569–70 (2006); Craig McEwen, *Examining Mediation in Context: Toward Understanding Variations in Mediation Programs*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 81, 86, 95 (Margaret S. Herrman ed., 2006); Rack & Rogers, *supra* note 6, at 714.

¹⁴ See generally WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (1985); James A. Wall, Jr. & Dale E. Rude, *Judicial Mediation of Settlement Negotiations*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* (Kenneth Kressel & Dean G. Pruitt eds., 1989). Relevant findings from this set of studies are discussed *infra* in Part IV.

¹⁵ DONNA STIENSTRA ET AL., *REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 178–213* (1997) (reporting findings from the Multi-Option Program in the United States District Court for the Northern District of California).

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types of judicial settlement conferences. Lawyers thought that settlement conferences with judges not assigned to the case raised substantially fewer concerns than settlement conferences with judges assigned to the case and had most of the same benefits. Mediation with volunteer mediators presented a mixed picture relative to both judicial settlement conference models. The findings, while probably influenced in part by how the models were implemented, reflect inherent structural differences among the models, including the neutrals' decisionmaking role, their closeness to the trial judge, and the proportion of their work life spent facilitating settlement.

Part II describes the survey's procedure, the survey's respondents, and the settlement procedure models. Part III presents the perceptions of lawyers and their preferences among the settlement procedure models; it then explores possible explanations for the findings. Part IV discusses the implications of the present study and additional research findings describing how courts choose between models of mediation and judicial settlement conferences. Part V summarizes the conclusions that can be drawn from the research and offers some additional considerations for courts' and parties' choice of settlement procedure models.

II. THE PRESENT SURVEY AND THE SETTLEMENT PROCEDURES

A. *Survey Procedure and Respondents*

In late December 2008, the Chief Judge of the United States District Court for the Southern District of Ohio sent a questionnaire to 290 lawyers that asked about their general experience with several types of settlement conferences and mediation in federal courts.¹⁶ One hundred thirty-six lawyers completed the questionnaire for a response rate of 47%.¹⁷ Most of the lawyers who responded had a substantial amount of legal experience: a

¹⁶ The lawyers surveyed had been counsel in a case mediated in the District Court Staff Mediation Program. Lawyers who had been lead counsel in a case mediated in this program received an additional questionnaire about their mediation experience in a specific case; those findings are not reported in this Article. Chief Judge Sandra Beckwith, Robert S. Kaiser, Robert W. Rack, Jr., and Eric C. Cook developed the questionnaires. After Judge Beckwith took senior status, she continued to oversee the completion of the survey. Eric C. Cook and Michael J. Bernstein entered the survey responses. The present Author served as a research consultant and analyzed the data.

¹⁷ To preserve the respondents' anonymity, completed surveys were mailed back to the Court Clerk's office, where staff removed the surveys from the return envelopes and assigned them numbers.

majority (61%) had been practicing law sixteen or more years, and 15% had been practicing law eleven to fifteen years.¹⁸

B. *Settlement Procedure Models*

The lawyers were asked to rate five settlement procedures on eleven dimensions¹⁹ and provide an overall preference ranking of the five procedures. The lawyers rated two types of judicial settlement conferences: conferences with judges or magistrate judges assigned to hear the merits of the case (hereafter “judges assigned” to the case) and conferences with judges or magistrate judges not assigned to hear the case (hereafter “judges not assigned” to the case). The lawyers also rated two types of court-connected mediation: mediation with court staff mediators (hereafter “staff mediators”) and mediation with volunteer mediators (hereafter “volunteer mediators”). The fifth settlement procedure the lawyers rated did not involve the court, either in terms of service provision or case referral: mediation with private, paid mediators (hereafter “private mediators”).

In order to increase the likelihood that lawyers’ ratings reflected their actual experience with the different settlement procedure models rather than their preconceptions, lawyers’ assessments of a given procedure were excluded from the analyses if they indicated they had not had experience with that procedure.²⁰ Lawyers’ ratings likely reflect their experience with settlement procedures in other districts as well as in the present district, as the questionnaire instructions asked about their “general experience with settlement conferences and mediation in federal courts.”²¹ Each settlement

¹⁸ Sixteen percent of the lawyers had been practicing law five to ten years, and seven percent had been practicing law fewer than five years.

¹⁹ For each dimension, the rating scale was as follows: 1 = strongly disagree, 2 = disagree somewhat, 3 = neither agree nor disagree, 4 = agree somewhat, and 5 = strongly agree.

²⁰ All of the lawyers who completed the questionnaire had experience with court staff mediators, but a few did not have experience with the other conference types: judges assigned to the case, three lawyers; judges not assigned to the case, twelve lawyers; private mediators, eleven lawyers; and volunteer mediators, nine lawyers.

²¹ Almost 25% of the lawyers to whom the questionnaire was sent were based outside the present district, and some of the lawyers based in the district were likely to also practice in neighboring districts. All of the lawyers had used the staff mediation model in the present district, see *supra* note 16, but they also might have used that model in other courts. We do not know where they had experience with the other settlement procedure models. In making their ratings, some lawyers might have focused primarily on their experience in the present district because the questionnaire was sent from and

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procedure model has certain features that are consistent across courts and certain features that vary depending on how the model is implemented in a particular court.²² To provide some context for interpreting the lawyers' responses, we describe below the settlement procedure models as implemented in the present district,²³ while also noting how they are implemented in other courts. In brief, the form that the settlement procedure models took in the present district is consistent with their basic underlying structures and is largely typical of their implementation in other courts, with the primary exception that volunteer mediation in the present district took place in the context of periodic Settlement Weeks rather than on a continuous basis.

1. *Settlement Conferences with Judges Assigned to the Case*

Judicial settlement conference practices in this district vary among the judges. Many of the district judges hold settlement conferences in some of the cases assigned to them, on their own initiative or at the request of the parties, however some of the judges hold settlement conferences in all of their cases that survive summary judgment.²⁴ Some of the judges do not hold settlement conferences in cases that will have a bench trial; others do so only if the parties consent, and still others hold settlement conferences in both the bench and jury cases assigned to them.²⁵ Settlement conferences typically are

was to be returned to this district, and the name of this district was at the top of the questionnaire.

²² See, e.g., Brazil, *supra* note 6, at 720; McEwen, *supra* note 13, at 83–92. For the many ways in which the structure of mediation programs differ across courts, see NIEMIC, *supra* note 2, at 7–13, 15–116 (providing descriptions of programs in individual circuits); PLAPINGER & STIENSTRA, *supra* note 1, at 71–308 (providing descriptions of programs in individual districts); Wissler, *supra* note 7, at 61–64, 71–73.

²³ Robert S. Kaiser, District Court Mediator for the Southern District of Ohio, provided supplemental information about the settlement conference and mediation procedures in this district. Personal communication on file with author.

²⁴ The method of referral to judicial settlement conferences varies across courts. The methods include referral on the judge's own initiative, referral at the parties' request, or mandatory referral of all cases that are ready for trial. See PLAPINGER & STIENSTRA, *supra* note 1, at 20–28.

²⁵ In some courts, the trial judge may conduct the settlement conference only if the case will be tried to a jury or if the parties consent. See Killefer, *supra* note 3, at 18; Jeffrey A. Parness, *Improving Judicial Settlement Conferences*, 39 U.C. DAVIS L. REV. 1891, 1904–05 (2006); Resnik, *supra* note 1, at 641 n.187.

scheduled for a half-day or less²⁶ and most often take place late in the case, shortly before summary judgment rulings or trial.²⁷ Lawyers and clients generally are required to attend the settlement conference.²⁸ Cases that do not settle proceed to trial before the same judge.²⁹

2. Settlement Conferences with Judges Not Assigned to the Case

Settlement conferences in this district are also conducted by judges not assigned to the case. Magistrate judges³⁰ conduct settlement conferences in cases referred to them on the initiative of the assigned district judge or at the request of the parties.³¹ Magistrate judges generally rule on discovery

²⁶ Judicial settlement conferences in other courts typically are reported to last two to four hours. See Baer, *supra* note 8, at 144; Edward Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 238, 249 (2002); Charles R. Pyle, *Mediation and Judicial Settlement Conferences: Different Rides on the Road to Resolution*, 33 ARIZ. ATT'Y 20, 22 (Nov. 1996). But see Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem-Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113, 120 (2009) (finding that most surveyed California general civil trial court judges reported that their settlement conferences lasted less than two hours).

²⁷ See Robinson, *supra* note 26, at 119–20 (finding that a majority of surveyed California general civil trial court judges reported typically conducting settlement conferences within a month of trial). In some courts, settlement conferences take place earlier in the case. See PLAPINGER & STIENSTRA, *supra* note 1, at 20–28.

²⁸ In some courts, parties are not present during judicial settlement conferences. See, e.g., E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 963 (1990); Dale E. Rude & James A. Wall, Jr., *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175, 177 tbl. 3 (1988).

²⁹ What happens if the case does not settle varies across courts, including proceeding to trial with the same judge, doing so only if the parties consent, and proceeding to trial with another judge following the automatic recusal of the trial judge. See, e.g., NIEMIC ET AL., *supra* note 3, at 80 n.203; Resnik, *supra* note 1, at 641 n.187; Robinson, *supra* note 1, at 367.

³⁰ Magistrate judges conduct most or all of the settlement conferences in over 30% of federal district courts and an unspecified proportion of conferences in other courts. PLAPINGER & STIENSTRA, *supra* note 1, at 6, 20–28.

³¹ In some courts, a judge other than the trial judge routinely conducts all settlement conferences. In other courts, a judge not assigned to the case conducts settlement conferences in cases scheduled for bench trials or in which the parties have requested that a judge other than the judge assigned to the case conduct the settlement conference. See PLAPINGER & STIENSTRA, *supra* note 1, at 20–28; Killefer, *supra* note 3, at 18; Parness, *supra* note 25, at 1904–05; Resnik, *supra* note 1, at 641 n.187.

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motions and conduct preliminary pretrial, status, and settlement conferences in cases assigned to them; they typically do not rule on issues regarding the admissibility of evidence at trial or on dispositive legal or factual issues, except in a few specified types of cases.³² Regardless of whether the judge conducting the settlement conference is or is not assigned to the case, a settlement conference is typically scheduled for a half-day or less, takes place late in the case, and requires the attendance of lawyers and clients.³³ The results of a conference are reported to the judge assigned to that case.

3. *Court-Connected Mediation with Staff Mediators*

Two models of court-connected mediation are provided in this district: staff mediation and volunteer mediation. The District Court Staff Mediation Program, which began in August 2007, provides mediation at no cost to litigants.³⁴ Cases are referred to the District Court Staff Mediation Program primarily at the request of the parties or on the initiative of the assigned judge, either by unilateral order or with the input of counsel.³⁵ Certain

³² See, e.g., U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, ORDER 91-3, IN RE: UNITED STATES MAGISTRATE JUDGES (July 31, 1991), available at <http://www.ohsd.uscourts.gov/generalorders/Columbus/91-3> In Re United States Magistrates.pdf; U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, GENERAL ORDER OF ASSIGNMENT AND REFERENCE, IN RE: UNITED STATES MAGISTRATE JUDGES (July 16, 2007), available at <http://www.ohsd.uscourts.gov/General Order of Reference 07-20-07.pdf>. In other courts, magistrate judges might have more substantive decisionmaking authority or might primarily conduct settlement conferences. See, e.g., NIEMIC ET AL., *supra* note 3, at 76; PLAPINGER & STIENSTRA, *supra* note 1, at 20-28.

³³ See *supra* notes 26-28.

³⁴ The description of the District Court Staff Mediation Program is drawn from the Court's website, at <http://www.ohsd.uscourts.gov/mediation.html>, <http://www.ohsd.uscourts.gov/mediation/faq.html>.

³⁵ Among the lawyers who responded to the case-specific survey about mediation with the court staff mediator in this district, *supra* note 16, 37% had requested mediation, 48% had been ordered to mediation by the judge with the parties' approval or acquiescence, and 15% had been ordered to mediation by the judge without consultation or over the objection of one or both parties. Cases also may be referred on the initiative of the Court Staff Mediator, although no such referrals have been made to date. The method of referral to court-connected mediation varies across courts, including referral at the judge's initiative, referral at the request of the parties, and the automatic referral of all cases that meet eligibility criteria. See, e.g., NIEMIC, *supra* note 2, at 8-9; PLAPINGER & STIENSTRA, *supra* note 1, at 7-8; Wissler, *supra* note 7, at 63, 72. Discussion of the features of court-connected mediation in other courts refers to both staff mediation and volunteer mediation unless otherwise noted.

categories of cases are exempt from mandatory referral to mediation, although parties in any type of civil case may request staff mediation.³⁶ Cases are mediated at any stage of litigation, from before discovery to after trial.³⁷ The single court staff mediator³⁸ is a lawyer who has prior federal court litigation and trial experience, as well as prior mediation experience in a variety of civil subject areas.³⁹

Before mediation in the District Court Staff Mediation Program, each party submits a brief statement of the factual and legal issues, the party's interests, and prior settlement efforts to the court staff mediator, who has access to case filings.⁴⁰ Parties with full settlement authority and lead lawyers in the case are required to personally attend mediation.⁴¹ Additional lawyers who are significantly involved in the case also often attend the mediation. The initial session typically is scheduled for a full day in one of

³⁶ See S.D. OHIO CIV. R. 16.3(b), available at <http://www.ohsd.uscourts.gov/localrules.htm> [hereinafter LOCAL RULES]. The categories of cases eligible for or exempt from court-connected mediation vary across courts. See, e.g., NIEMIC, *supra* note 2, at 6–7; PLAPINGER & STIENSTRA, *supra* note 1, at 7–8; Wissler, *supra* note 7, at 62, 71.

³⁷ The timing of court-connected mediation varies across courts. See, e.g., NIEMIC, *supra* note 2, at 9–10; PLAPINGER & STIENSTRA, *supra* note 1, at 8–9; Wissler, *supra* note 7, at 62–63, 71.

³⁸ To the extent that the lawyers' experience with the staff mediation model was only or primarily in this district, the present findings might substantially reflect the skills and approach of this individual. We use the plural "staff mediators" when discussing the findings because lawyers' responses might also reflect their experience with staff mediators in other courts.

³⁹ The staff mediator's training and experience requirements in this district are typical of those in other courts. See generally, NIEMIC, *supra* note 2, at 15–116. Staff mediators are typically lawyers, though some mediation programs use magistrate judges, senior federal judges, or retired state court judges as mediators. See NIEMIC, *supra* note 2, at 12–13; PLAPINGER & STIENSTRA, *supra* note 1, at 9, 19 n.24; Geetha Ravindra, *Virginia's Judicial Settlement Conference Program*, 26 JUST. SYS. J. 293, 300 (2005); Wissler, *supra* note 7, at 64, 73.

⁴⁰ The case information that court-connected mediators receive prior to the session varies across courts. See generally, NIEMIC, *supra* note 2, at 15–116; PLAPINGER & STIENSTRA, *supra* note 1, at 71–308.

⁴¹ Counsel and parties with settlement authority are typically required to attend court-connected mediation in trial court programs; party attendance is less likely to be required in appellate mediation programs. See NIEMIC, *supra* note 2, at 11–12; PLAPINGER & STIENSTRA, *supra* note 1, at 8; Wissler, *supra* note 7, at 63, 72.

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the three courthouses in the district.⁴² Mediation usually begins with a joint session to discuss the process and ground rules, followed by separate caucuses with each side to discuss the substance of the dispute. If additional work is required, extra in-person sessions or follow-up telephone conferences are arranged. All mediation communications are confidential.⁴³ The staff mediator reports to the court only whether mediation efforts are continuing or whether the case has settled or reached impasse.⁴⁴

4. *Court-Connected Mediation with Volunteer Mediators*

The second model of mediation used in this district is volunteer mediation. Each of the three court divisions has a roster of volunteers from the local bar who receive no compensation and who can be assigned to mediate cases at no cost to litigants. These volunteers typically mediate cases during Settlement Week events,⁴⁵ which are held several times a year in two of the court's divisions.⁴⁶ Cases not exempt from mandatory referral to mediation typically are assigned to Settlement Week mediation by judges without input from counsel, although parties may opt out if they believe mediation will be unproductive.⁴⁷ Parties may also request referral to

⁴² The length of the initial session in court-connected mediation varies considerably across courts. *See* Wissler, *supra* note 7, at 63–64, 72. *See generally* NIEMIC, *supra* note 2, at 15–116; PLAPINGER & STIENSTRA, *supra* note 1, at 72–308.

⁴³ *See* LOCAL RULES, *supra* note 36, Rule 16.3(c).

⁴⁴ Confidentiality provisions and limitations on reports to the court are common in court-connected mediation programs. *See, e.g.*, NIEMIC, *supra* note 2, at 12; PLAPINGER & STIENSTRA, *supra* note 1, at 71–308.

⁴⁵ Cases in this district may also be referred to a volunteer mediator outside of the Settlement Week program, but that occurs infrequently. In most other courts, volunteer mediation occurs on an ongoing basis rather than in the context of Settlement Week. *See* PLAPINGER & STIENSTRA, *supra* note 1, at 36–49, 55. *See generally* HAROLD PADDOCK, SETTLEMENT WEEK: A PRACTICAL MANUAL FOR RESOLVING CIVIL CASES THROUGH MEDIATION (1990); Kathleen M. Maloney, *Settlement Week in Ohio*, OHIO LAW., May-June 1996, at 14.

⁴⁶ The third division does not have a Settlement Week program. The description of the Settlement Week programs is drawn from the following sources: PLAPINGER & STIENSTRA, *supra* note 1, at 222–24; GENERAL ORDER ON SETTLEMENT WEEK, EASTERN DIVISION ORDER NO. 01–2 (January 8, 2001), *available at* <http://www.ohsd.uscourts.gov/generalorders/Columbus/01-2GenOrderReSettlementWeek.pdf>; GENERAL ORDER REGARDING ON-GOING MEDIATION PROGRAM (March 16, 2005), *available at* <http://www.ohsd.uscourts.gov/generalorders/Cincinnati/G.O.Mediation-Cin03-16-2005.pdf>.

⁴⁷ *See* LOCAL RULES, *supra* note 36, Rule 16.3(b).

Settlement Week mediation. In most cases, discovery has been completed and motions have been decided before mediation takes place, though the parties may specify which of the Settlement Week events during the year they think will permit the most productive mediation timing. Cases are randomly assigned to a mediator from a list of approved mediators. The volunteer mediators are lawyers who have substantial federal litigation experience and mediation training.⁴⁸

Before volunteer mediators conduct mediation, parties must exchange written settlement demands and offers. The mediator receives this information, as well as relevant portions of the case file, prior to the initial session. The trial lawyer and someone with settlement authority for each party are required to personally attend mediation. Mediation sessions are typically held in the courthouse. The initial mediation session usually is scheduled for ninety minutes, although the mediator and the parties often agree to extend the session or schedule an additional session if they think it will be productive. All mediation communications are confidential.⁴⁹ Unless otherwise authorized by the parties, volunteer mediators may report to the court only: whether the case has settled or may soon settle; suggestions for case management if the case did not settle, such as whether additional discovery, motions, or a judicial settlement conference might be helpful; and “information about the parties’ conduct if the neutral concludes that a party did not participate in good faith . . . or otherwise violated a Court order or Disciplinary Rule relating to the proceeding.”⁵⁰

5. *Private Mediation*

This district encourages the use of private mediators when they are preferred by the parties. Parties are free to arrange and pay for private

⁴⁸ Non-staff mediators in general civil cases typically are lawyers, but in some courts may also be non-lawyers. *See, e.g.*, PLAPINGER & STIENSTRA, *supra* note 1, at 36–48, 55. We do not know how much mediation training or mediation experience the volunteer mediators in this district had. Volunteer mediators generally have less stringent training and experience requirements than staff mediators, and those in Settlement Week programs or programs with larger rosters typically mediate only a few cases per year. *See, e.g.*, COLE ET AL., *supra* note 2, § 6.12; PLAPINGER & STIENSTRA, *supra* note 1, at 71–308; Brazil, *supra* note 6, at 782–83, 800–01; McAdoo & Welsh, *supra* note 6, at 22; Senft & Savage, *supra* note 8, at 308–09; Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 654–55 (2002).

⁴⁹ *See* LOCAL RULES, *supra* note 36, Rule 16.3(c).

⁵⁰ *See id.*, Rule 16.3(c)(3)(A).

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mediation, but the court does not refer cases to private mediators.⁵¹ Because the focus of this Article is on court-connected settlement procedures, only limited comparisons with private mediation are reported herein.⁵²

III. LAWYERS' VIEWS OF THE SETTLEMENT PROCEDURES

This part presents lawyers' views of the five different settlement procedure models on eleven specific dimensions, as well as their rankings of the models in terms of overall preference. Before discussing the survey findings, a few points are worth mentioning.

First, the ratings reflect lawyers' perceptions of the degree to which the settlement procedure models possess certain characteristics. We do not have independent observations to show, for instance, whether parties were in fact more candid in some models than others.⁵³ Nonetheless, "feelings about the quality and usefulness of the services courts provide are very important facts and forces in themselves."⁵⁴ Second, the five settlement procedure models

⁵¹ We have no information about the private mediators in this district. Many private general civil mediators are retired judges. *See, e.g.*, STACY LEE BURNS, MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS 20 (2000). Typically, more time is allotted to sessions in private mediation than in court-connected mediation. *See id.* at 131, 211 (noting that private mediators can devote as much time as the parties are willing to pay for); Pyle, *supra* note 26, at 22.

⁵² To briefly summarize the full set of comparisons: private mediation was rated higher than mediation with staff mediators on three dimensions, lower on three dimensions, and similarly on five dimensions. Private mediation was rated higher than mediation with volunteer mediators on ten dimensions and similarly on a single dimension: bias. Additionally, private mediation was rated higher than judicial settlement conferences on five or six dimensions (depending on the type of judge), lower on two dimensions, and similarly on four or five dimensions.

⁵³ Although the analyses included lawyers' ratings of only those procedures with which they had experience, their ratings could also be influenced by stereotypes of the problems or benefits associated with the different procedures. *See, e.g.*, Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 247-49 (1977) (reporting research findings that people often make inaccurate assertions about what influences their evaluations and behavior, based on shared or individual implicit causal theories).

⁵⁴ Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 250-51 (2006); *see also* ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 64-83, 207-11 (1988); Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 348-51 (1989); Blair H. Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, 6 ORGANIZATIONAL BEHAV. 141, 169-

differed from each other in numerous ways, including the characteristics of the neutrals and the structures of the procedures, any of which could have influenced lawyers' ratings of the models on a particular dimension. We explore how these different aspects of the models might explain how lawyers view the settlement procedures.

Finally, as noted in the preceding section, we do not know to what extent the lawyers' perceptions of a given settlement procedure model were based on their experience with the model in the district in which the survey was conducted or in other districts, or to what extent they were reacting to the inherent features of the models or to how they were implemented. The implementation of the settlement procedure models in the present district was consistent with their basic underlying structures and was largely typical of their implementation in other courts. The primary exception is the volunteer mediation model, which took place in the context of periodic Settlement Weeks in this district but on an ongoing basis in most other courts.⁵⁵ Accordingly, we discuss how the Settlement Week structure might lead to different ratings of the volunteer mediation model on some dimensions. In addition, it is worth noting that if the lawyers' ratings of the staff mediation model were based largely on their experiences with the single staff mediator in this district, that model might be viewed differently in courts with different staff mediators.

A. Allowing Candid and Full Exploration of Settlement Without Concerns of Negative Consequences or Prejudice

The lawyers indicated for each settlement procedure whether they thought that "parties can be candid with [the neutral] about interests and difficulties in the case without concerns of negative consequences."⁵⁶ Lawyers thought that parties could be much less candid with judges assigned to the case than with each of the other types of neutrals (see Table 1).⁵⁷ In

90 (1984); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 68–69, 71 (Joseph Sanders & V. Lee Hamilton eds., 2000).

⁵⁵ See *supra* note 45 and accompanying text.

⁵⁶ The questionnaire's wording is provided in quotes in the initial discussion of each dimension.

⁵⁷ Judges not assigned, $t(118) = 12.37$, $p < .001$; staff mediators, $t(127) = 18.14$, $p < .001$; volunteer mediators, $t(119) = 14.33$, $p < .01$; private mediators, $t(121) = 19.70$, $p < .001$. The t statistic is used to determine whether an observed difference between two or more of the settlement procedure models is a "true" difference (i.e., a statistically significant difference) or merely a chance variation. The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e., $p < .05$). See

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addition, lawyers thought that parties could be less candid without concerns of negative consequences with judges not assigned to the case than with any of the mediators.⁵⁸ Lawyers' ratings of how candid parties could be with staff mediators or with volunteer mediators did not differ. But lawyers thought that parties could be less candid with court-connected mediators than with private mediators.⁵⁹

Table 1 Parties can be candid without concerns	disagree strongly	disagree somewhat	neither agree nor disagree	agree somewhat	agree strongly	mean
judges assigned to case	23%	48%	7%	18%	4%	2.31
judges not assigned to case	1%	25%	13%	39%	22%	3.57
court staff mediators	2%	5%	5%	32%	56%	4.36
volunteer mediators	0%	6%	11%	34%	49%	4.27
private mediators	0%	2%	3%	30%	65%	4.56

Lawyers thought that judges assigned to the case were much less "able to fully explore settlement without prejudice to ongoing litigation if the case is not settled" than other types of neutrals (see Table 2).⁶⁰ In addition, lawyers thought that judges not assigned to the case were less able to explore settlement without prejudice than any of the mediators.⁶¹ Lawyers' ratings of whether staff or volunteer mediators could fully explore settlement did not differ. Lawyers thought that both types of court-connected mediators could

RICHARD P. RUNYON & AUDREY HABER, FUNDAMENTALS OF BEHAVIORAL STATISTICS 230, 278–80 (5th ed. 1984). Thus, the models reported as differing herein are statistically significantly different, and the models reported as not differing are not statistically significantly different.

⁵⁸ Staff mediators, $t(119) = 7.79, p < .001$; volunteer mediators, $t(115) = 5.94, p < .001$; private mediators, $t(114) = 9.86, p < .001$.

⁵⁹ Staff mediators, $t(122) = 3.27, p < .01$; volunteer mediators, $t(118) = 4.68, p < .001$.

⁶⁰ Judges not assigned, $t(118) = 13.32, p < .001$; staff mediators, $t(129) = 17.51, p < .001$; volunteer mediators, $t(120) = 14.38, p < .001$; private mediators, $t(123) = 16.85, p < .001$.

⁶¹ Staff mediators, $t(119) = 7.11, p < .001$; volunteer mediators, $t(115) = 4.88, p < .001$; private mediators, $t(114) = 7.89, p < .001$.

less fully explore settlement without prejudice to ongoing litigation than private mediators, though the differences were relatively small.⁶²

Table 2 Can explore settlement fully without prejudice	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	24%	36%	11%	22%	8%	2.53
judges not assigned to case	1%	15%	16%	40%	28%	3.80
court staff mediators	2%	3%	8%	28%	60%	4.41
volunteer mediators	1%	2%	14%	30%	53%	4.32
private mediators	1%	0%	8%	26%	66%	4.55

The main factor that appeared to affect whether lawyers thought they could candidly and fully discuss settlement with the neutral without negative consequences or prejudice to ongoing litigation was whether the neutral facilitating settlement discussions would make subsequent substantive decisions in the case and preside at the trial.⁶³ Finding that settlement conferences with judges not assigned to the case were rated lower on these two dimensions than all models of mediation suggests that a settlement facilitator with any potential decisionmaking role in the case raised concerns that information discussed during the settlement conference could affect subsequent rulings. Or perhaps lawyers thought that judges would be more likely than mediators to talk to the trial judge about the case, either because the judges would be more likely to communicate with the trial judge about other pretrial proceedings in the case⁶⁴ or because the mediators had explicit confidentiality provisions and reporting limitations.⁶⁵

⁶² Staff mediators, $t(124) = 2.39$, $p < .05$; volunteer mediators, $t(118) = 3.97$, $p < .001$.

⁶³ See NIEMIC ET AL., *supra* note 3, at 78–80; Brunet, *supra* note 26, at 246, 248, 251, 258; Killefer, *supra* note 3, at 19; Ravindra, *supra* note 39, at 300–01; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 385 (1982); Frank E. A. Sander, *A Friendly Amendment*, 6 DISP. RESOL. MAG. 11 (1999); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 760 (1989).

⁶⁴ See NIEMIC ET AL., *supra* note 3, at 75–76 (noting that magistrate judges might be seen as too close to the assigned judge); Sander, *supra* note 63, at 22.

⁶⁵ See, e.g., NIEMIC ET AL., *supra* note 3, at 76, 93 n.242, 112–13; Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-*

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Some commentators have wondered whether concerns about negative consequences to ongoing litigation would arise with staff mediators because they are more closely linked to the court than volunteer mediators.⁶⁶ Lawyers did not rate these two types of mediators differently. Lawyers did appear to think, however, that there was a greater possibility of communication between the mediator and the trial judge with both types of court-connected mediators than with private mediators, although the differences were small.⁶⁷

B. Bias

Lawyers thought that judges assigned to the case were much more likely to be “biased” than any other type of neutral (see Table 3).⁶⁸ Lawyers’ ratings of judges not assigned to the case and volunteer mediators did not differ, but both were seen as more biased than staff mediators.⁶⁹ Lawyers’ ratings of private mediators did not differ from their ratings of either staff or volunteer mediators.

Table 3 Neutrals are biased	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	24%	24%	20%	25%	6%	2.65
judges not assigned to case	51%	31%	12%	7%	0%	1.74
court staff mediators	67%	16%	13%	2%	2%	1.56
volunteer mediators	54%	23%	18%	4%	2%	1.77
private mediators	63%	16%	14%	6%	1%	1.64

Disciplinary Approach, 54 U. KANSAS L. REV. 1387, 1409, 1414–16 (2006); McAdoo & Welsh, *supra* note 6, at 29, 34; Ravindra, *supra* note 39, at 302–03; *see also infra* note 120.

⁶⁶ *See* Brazil, *supra* note 6, at 775–76; McAdoo & Welsh, *supra* note 6, at 22; McCrory *supra* note 6, at 851.

⁶⁷ *See* Brazil, *supra* note 6, at 776.

⁶⁸ Judges not assigned, $t(116) = 8.05$, $p < .001$; staff mediators, $t(127) = 8.30$, $p < .001$; volunteer mediators, $t(118) = 6.21$, $p < .001$; private mediators, $t(121) = 7.23$, $p < .001$.

⁶⁹ Judges not assigned, $t(119) = 2.14$, $p < .05$; volunteer mediators, $t(122) = 2.33$, $p < .05$.

If lawyers were focused on bias during the settlement procedure itself, it is not clear why they would think that judges assigned to the case were much more likely to be biased than other neutrals, and why there were only a few small differences among the other neutrals.⁷⁰ Perhaps judges assigned to the case were more likely than other neutrals to recommend a settlement range or predict the trial outcome, or perhaps their opinions had more force, which lead lawyers to view them as favoring one side during the conference.⁷¹

Instead, the pattern of findings might indicate that lawyers were focused on bias in subsequent decisions. Lawyers might be concerned that judges assigned to the case would form views of the parties and opinions about the case based on limited evidence or one-sided information provided by the opposing party during a private caucus, and that those views would affect the judge's open-mindedness and impartiality at trial.⁷² One of the most important benefits that judges in this district saw for staff mediation was that it allowed them to avoid the risk of not appearing objective after they conducted in-depth settlement conferences.⁷³

C. Time Availability

Lawyers thought that staff mediators were much more "able to devote sufficient time to fully explore settlement" than were any of the other court-connected neutrals, but were slightly less able to devote sufficient time than were private mediators (see Table 4).⁷⁴ Lawyers thought that volunteer mediators were more able to devote sufficient time to fully explore

⁷⁰ Issues of bias might be less likely to arise for staff mediators than for volunteer mediators because they are employed by the court and presumably would not have been selected or retained if they had demonstrated a bias. See, e.g., Brazil, *supra* note 6, at 757–58, 768–70. Lawyers who serve as volunteer mediators might be seen as having predispositions toward one side or the other based on their litigation practice. *Id.*

⁷¹ See Brazil, *supra* note 6, at 744 (arguing that there is more risk that the third party will be viewed as biased if they make evaluative, substantive, or directive suggestions); Killefer, *supra* note 3, at 19–21.

⁷² See MODEL CODE OF JUDICIAL CONDUCT, R. 2.6 & cmts. 2, 3 (Feb. 2007) (cautioning judges that their involvement in settlement conferences can affect their views of the case, as well as lawyers' and parties' perceptions of their objectivity and impartiality); see also *infra* notes 138–40 and accompanying text.

⁷³ Letter from Judge Sandra S. Beckwith to Chief Justice Roberts (Sept. 22, 2009), on file with author (hereinafter Letter).

⁷⁴ Judges assigned, $t(129) = 16.08$, $p < .001$; judges not assigned, $t(120) = 15.30$, $p < .001$; volunteer mediators, $t(121) = 10.22$, $p < .001$; private mediators, $t(125) = 2.46$, $p < .05$.

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settlement than was either type of judge⁷⁵ and that judges not assigned to the case were more able to devote sufficient time than were judges assigned to the case,⁷⁶ but these differences were relatively small.

Table 4 Neutrals are able to devote sufficient time	disagree strongly	disagree somewhat	neither agree nor disagree	agree somewhat	agree strongly	mean
judges assigned to case	11%	44%	16%	24%	5%	2.69
judges not assigned to case	5%	40%	24%	25%	6%	2.86
court staff mediators	1%	3%	7%	36%	53%	4.38
volunteer mediators	9%	28%	20%	30%	13%	3.11
private mediators	0%	2%	4%	29%	64%	4.56

These findings might largely reflect the amount of time that the different procedures typically allocate to sessions. But the ratings might also reflect lawyers' sense of the neutrals' more general time availability. For instance, judges might stress that they have limited time for the conference, have to leave the conference to handle other matters, have less scheduling flexibility, and be less available for follow-up sessions or additional discussions than mediators.⁷⁷ Similarly, volunteer mediators might be seen as having more limited availability for follow-up conversations or additional mediation sessions than staff mediators because mediation is not their primary focus, especially if they only mediate during Settlement Week. Thus, lawyers' ratings on this dimension might encompass their sense of the time and attention the neutrals can devote to exploring settlement rather than just the length of the session.

One indicator of neutrals' availability is whether they "respond timely to the needs of the parties." Lawyers thought that staff mediators responded more timely to parties' needs than any other type of court-connected

⁷⁵ Judges assigned, $t(119) = 2.79, p < .01$; judges not assigned, $t(115) = 2.16, p < .05$.

⁷⁶ $t(118) = 2.09, p < .05$.

⁷⁷ See BURNS, *supra* note 51, at 111–12, 131–32, 212 (observing that sitting judges sometimes conducted multiple settlement conferences simultaneously or ran out of time to finish the conference); Baer, *supra* note 8, at 144; Brazil, *supra* note 6, at 787; Brunet, *supra* note 26, at 249–50; Pyle, *supra* note 26, at 22, 54–55.

neutrals,⁷⁸ but did not see staff mediators as differing from private mediators (see Table 5). Lawyers also thought that volunteer mediators responded more timely than judges not assigned to the case, though the difference was relatively small.⁷⁹ Lawyers did not see either volunteer mediators or judges not assigned to the case as responding more timely than judges assigned to the case. The characteristic that seemed to influence whether lawyers thought neutrals responded timely was whether their primary job was facilitating settlement or whether they had additional work duties.

Table 5 Neutrals respond timely to parties	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	3%	23%	24%	35%	16%	3.37
judges not assigned to case	3%	20%	31%	31%	14%	3.31
court staff mediators	2%	1%	8%	47%	42%	4.25
volunteer mediators	1%	15%	28%	37%	20%	3.60
private mediators	0%	2%	7%	42%	48%	4.38

D. Incorporating Clients into the Process

Lawyers thought that staff mediators were more likely to “incorporate clients in the settlement process in a meaningful way” than were any other type of court-connected neutrals,⁸⁰ but did not see them as differing from private mediators (see Table 6). In addition, lawyers thought that judges not assigned to the case were more likely to incorporate clients in a meaningful way than were judges assigned to the case.⁸¹ Lawyers did not see volunteer mediators as differing from either type of judge in how meaningfully they incorporated clients into the process.

⁷⁸ Judges assigned, $t(126) = 7.97, p < .001$; judges not assigned, $t(117) = 8.22, p < .001$; volunteer mediators, $t(121) = 6.38, p < .001$.

⁷⁹ $t(113) = 2.53, p < .05$.

⁸⁰ Judges assigned, $t(127) = 5.88, p < .001$; judges not assigned, $t(119) = 4.34, p < .001$; volunteer mediators, $t(121) = 5.13, p < .001$.

⁸¹ $t(117) = 3.15, p < .01$.

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Table 6 Neutrals incorporate client in meaningful way	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	5%	11%	21%	38%	25%	3.66
judges not assigned to case	1%	4%	24%	48%	23%	3.88
court staff mediators	1%	1%	12%	40%	46%	4.28
volunteer mediators	0%	6%	25%	51%	18%	3.81
private mediators	0%	1%	15%	45%	39%	4.22

In part, these findings seem to reflect prototypical differences in the role parties and neutrals have in mediation as opposed to judicial settlement conferences.⁸² Mediation tends to place greater emphasis on party involvement and on the views and interests of parties,⁸³ and the neutral tends to devote more time to eliciting information from the parties than providing information to them.⁸⁴ Mediators are more likely to try to facilitate party self-

⁸² These differences are likely to be more a matter of degree than kind. *See, e.g.,* BURNS, *supra* note 51, at 210–11. Neutrals’ practices were “more similar than different” in judicial settlement conferences and private mediation, although all observed mediators were retired judges. *Id.* at 8; *see also* Robinson, *supra* note 26, at 124–39 (concluding that California general civil trial court judges were less directive and had a broader focus during settlement conferences than generally thought); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 25 (2001).

⁸³ *See e.g.,* Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 475, 523 (2002) (reporting that surveyed lawyers said a majority of mediators routinely helped parties understand each others’ perspectives and asked clients to talk about their concerns and goals); Pyle, *supra* note 26, at 54–55; Robinson, *supra* note 26, at 127 (finding that almost half of surveyed California general civil trial court judges reported focusing on the needs and goals of parties in a majority of their settlement conferences); Rude & Wall, *supra* note 28, at 177 tbl. 3; Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 332–33 (1999); Wall & Rude, *supra* note 14, at 194–95 tbl. 9.1.

⁸⁴ *See* Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 228, 233 n.9 (2007) (describing differences between how he conducted settlement conferences as a magistrate judge and how the court trained its mediators to conduct mediations, including that the judge talks more and

determination and less likely to engage in strong-arm tactics than judges.⁸⁵ Mediators are also more likely than judges to adopt a problem-solving, rather than predictive, approach.⁸⁶

Alternatively, the pattern of ratings might suggest that the time allocated to the process affects how meaningfully neutrals can incorporate parties into the settlement process. Some have suggested that judges' time constraints lead them to push parties to make as much progress as possible, resulting in sessions that are more directive and grant the parties less opportunity to talk.⁸⁷ To the extent that volunteer mediation involves shorter sessions than the other mediation models, meaningful party participation might be constrained. Volunteer mediators also might be seen as incorporating clients less meaningfully than staff or private mediators because they are likely to have less mediation training and experience.⁸⁸

E. Credibility, Input, and Managing Clients

Lawyers thought that judges assigned to the case had more "credibility regarding settlement considerations,"⁸⁹ and that volunteer mediators had less credibility,⁹⁰ than each of the other types of neutrals (see Table 7). Lawyers thought that staff mediators had less credibility regarding settlement

is more "analytically active"); Brunet, *supra* note 26, at 236; Pyle, *supra* note 26, at 23, 54–55; Robinson, *supra* note 26, at 126, 133–37, 140; Sander *supra* note 63, at 11, 22.

⁸⁵ See, e.g., Alfini, *supra* note 1, at 13–14; Brunet, *supra* note 26, at 234, 248; Robinson, *supra* note 26, at 133–37, 140; Rude & Wall, *supra* note 28, at 177 tbl. 3; Sander, *supra* note 63, at 22; Wall & Rude, *supra* note 14, at 194–95 tbl. 9.1. Several studies found that a majority of parties and lawyers reported that mediators did not pressure them to settle. See McAdoo & Hinshaw, *supra* note 83, at 523; Wissler, *supra* note 7, at 65, 74.

⁸⁶ See NIEMIC ET AL., *supra* note 3, at 75–76; Craig McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 78–79 (1991); Robinson, *supra* note 26, at 135, 140; Rude & Wall, *supra* note 28, at 177 Table 3; Sander, *supra* note 63, at 11, 22; Wall & Rude, *supra* note 14, at 194–95 tbl. 9.1.

⁸⁷ See BURNS, *supra* note 51, at 131, 211; Brazil, *supra* note 6, at 787–88; Pyle, *supra* note 26, at 22, 54–55.

⁸⁸ See *supra* note 48.

⁸⁹ Judges not assigned, $t(117) = 2.68$, $p < .01$; staff mediators, $t(128) = 4.63$, $p < .001$; volunteer mediators, $t(119) = 9.73$, $p < .001$; private mediators, $t(122) = 6.37$, $p < .001$.

⁹⁰ Judges assigned, $t(119) = 9.73$, $p < .001$; judges not assigned, $t(116) = 10.57$, $p < .001$; staff mediators, $t(122) = 8.80$, $p < .001$; private mediators, $t(119) = 6.62$, $p < .001$.

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considerations than either type of judge, but more credibility than private mediators.⁹¹

Table 7 Neutrals have credibility regarding settlement	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	2%	3%	2%	30%	62%	4.47
judges not assigned to case	1%	2%	6%	54%	37%	4.26
court staff mediators	2%	2%	14%	57%	26%	4.02
volunteer mediators	4%	20%	34%	31%	11%	3.24
private mediators	1%	8%	25%	44%	22%	3.79

Judges, especially trial judges, might be seen as having more credibility regarding settlement considerations because of the inherent respect and authority of their position and because they are likely to have more experience deciding cases, more involvement with jury trials, and more exposure to a wider range of legal issues.⁹² Judges also might be seen as having more credibility because they presumably are more familiar with the facts and issues in the case and, thus, would be better able to evaluate the merits and value of the case.⁹³ Moreover, if the case will be tried to the judge rather than to a jury, the judge assigned to the case is predicting his own future decision and presumably would be able to do so more accurately than other neutrals.⁹⁴

Given that all three types of mediators are likely to have substantial litigation experience, it is not clear why there were differences in perceived credibility among them. Perhaps staff mediators, by virtue of their position with the court, have more presumptive status and respect,⁹⁵ and hence were

⁹¹ Judges assigned, $t(128) = 4.63$, $p < .001$; judges not assigned, $t(120) = 3.45$, $p < .01$; private mediators, $t(125) = 3.20$, $p < .01$.

⁹² See, e.g., BURNS, *supra* note 51, at 177; NIEMIC ET AL., *supra* note 3, at 75–76; Brunet, *supra* note 26, at 239; Killefer, *supra* note 3, at 19; Pyle, *supra* note 26, at 21.

⁹³ See, e.g., Killefer, *supra* note 3, at 19.

⁹⁴ See also BRAZIL, *supra* note 14, at 65, 68–69 (reporting that lawyers thought that trial judges' opinions about a reasonable dollar settlement range were more effective in non-jury cases than in jury cases and that trial judges' opinions were more effective than settlement judges' opinions in non-jury cases).

⁹⁵ See Brazil, *supra* note 6, at 759–60.

seen as having more credibility regarding settlement considerations than private or volunteer mediators. Or perhaps this reflects differences in the mediators' knowledge of the subject matter of the case:⁹⁶ volunteer mediators might be less knowledgeable than staff mediators, who would have been exposed to a wider range of issues, or than private mediators, who might have been selected for their substantive expertise.

Lawyers thought that volunteer mediators were less likely to "provide input that is useful to the client in considering settlement" than any of the other neutrals (see Table 8).⁹⁷ There were no differences in lawyers' ratings of the usefulness of the input provided by staff versus private mediators, by judges assigned versus judges not assigned to the case, or between these two types of mediators and the two types of judges.

Table 8 Neutrals provide useful input	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	3%	5%	5%	38%	50%	4.26
judges not assigned to case	0%	2%	7%	60%	30%	4.17
court staff mediators	1%	3%	13%	51%	33%	4.12
volunteer mediators	2%	11%	33%	43%	11%	3.52
private mediators	0%	2%	16%	52%	29%	4.08

As with the credibility ratings, it is not clear why then input of volunteer mediators was seen less useful than the input of staff or private mediators. Perhaps a volunteer mediator's input was seen as less useful because they were likely to be less familiar with the subject matter and have less experience acting as a neutral facilitating settlement. Additionally to the

⁹⁶ Most lawyers think that mediators should have substantive expertise. See TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 205 n.15 (2009); ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, FINAL REPORT 6 (2008) [hereinafter *MEDIATION QUALITY*], available at <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf>; McAdoo & Hinshaw, *supra* note 83, at 524.

⁹⁷ Judges assigned, $t(119) = 6.00$, $p < .001$; judges not assigned, $t(115) = 6.30$, $p < .001$; staff mediators, $t(121) = 6.11$, $p < .001$; private mediators, $t(118) = 7.52$, $p < .001$.

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extent that mediation with volunteer mediators involved shorter sessions than the other mediation models, volunteer mediators might not have been able to learn enough about the case and the parties' interests to provide useful input.

Lawyers thought that volunteer mediators were less likely to "help counsel manage difficult parties" than any of the other types of neutrals (see Table 9).⁹⁸ Although the differences were smaller, lawyers also thought that both staff and private mediators were less likely to help counsel to manage difficult parties than either type of judge.⁹⁹ There were no differences in lawyers' ratings between staff and private mediators or between the two types of judges.

Table 9 Neutrals help counsel manage difficult parties	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	4%	5%	15%	30%	46%	4.10
judges not assigned to case	1%	4%	19%	43%	33%	4.03
court staff mediators	2%	5%	23%	50%	20%	3.80
volunteer mediators	7%	19%	38%	30%	6%	3.07
private mediators	2%	3%	33%	45%	17%	3.72

Judges might be seen as more helpful in managing difficult parties than mediators if their greater status, authority, and credibility lead litigants to find judges' case evaluations more persuasive than mediators' evaluations.¹⁰⁰ Or judges might be more likely to engage in strong-arm tactics than mediators.¹⁰¹ Volunteer mediators might be seen as less helpful in managing difficult parties than staff or private mediators because they are seen as having less credibility and are likely to have less experience in the role of a neutral facilitating settlement.

⁹⁸ Judges assigned, $t(119) = 7.63, p < .001$; judges not assigned, $t(115) = 8.17, p < .001$; staff mediators, $t(121) = 7.20, p < .001$; private mediators, $t(118) = 7.44, p < .001$.

⁹⁹ Staff mediators: judges assigned, $t(126) = 2.94, p < .01$; judges not assigned, $t(119) = 2.66, p < .01$. Private mediators: judges assigned, $t(120) = 3.26, p < .01$; judges not assigned, $t(114) = 2.74, p < .01$.

¹⁰⁰ See, e.g., Brunet, *supra* note 26, at 239; Killefer, *supra* note 3, at 19 ("A judge has a position of authority that he can use to leverage his views on settlement.").

¹⁰¹ See, e.g., Alfini, *supra* note 1, at 13-14; Brunet, *supra* note 26, at 248.

F. *Providing Good Service and Making Good Use of Party Resources*

Lawyers thought that mediation with volunteer mediators was less likely to “leave clients feeling well served by the process, regardless of outcome,” than the other types of settlement procedures (see Table 10).¹⁰² In addition, lawyers thought that settlement conferences with judges assigned to the case were less likely to leave clients feeling well served than were settlement conferences with judges not assigned to the case or mediation with staff mediators.¹⁰³ Lawyers’ ratings of mediation with staff mediators and settlement conferences with judges not assigned to the case did not differ. But lawyers thought that mediation with staff mediators was more likely to leave clients feeling well served, regardless of the outcome, than mediation with private mediators.¹⁰⁴ The rating of private mediation did not differ from that of judicial settlement conferences.

Table 10 Neutrals leave client feeling well served	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	3%	12%	32%	35%	18%	3.53
judges not assigned to case	1%	8%	30%	41%	19%	3.70
court staff mediators	1%	4%	26%	45%	25%	3.89
volunteer mediators	2%	14%	51%	27%	6%	3.21
private mediators	0%	3%	37%	44%	15%	3.72

Perhaps volunteer mediators were seen as less likely to leave clients feeling well served, regardless of outcome, than each of the other neutrals because volunteer mediators were least likely to have experience in the role of a neutral facilitating settlement. In addition, the pattern of relative ratings among the neutrals in terms of whether they provided useful input and incorporated parties meaningfully into the process paralleled the pattern on

¹⁰² Judges assigned, $t(118) = 2.58, p < .05$; judges not assigned, $t(114) = 4.82, p < .001$; staff mediators, $t(120) = 7.35, p < .001$; private mediators, $t(117) = 6.04, p < .001$.

¹⁰³ Judges not assigned, $t(116) = 2.92, p < .01$; staff mediators, $t(126) = 3.33, p < .01$.

¹⁰⁴ $t(122) = 2.24, p < .05$.

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the present dimension, suggesting that those characteristics might have influenced lawyers' views of whether clients felt well served.

Lawyers thought that mediation with staff mediators was more likely to "make good use of the parties' resources" than were each of the other procedures (see Table 11).¹⁰⁵ Lawyers thought that mediation with private mediators and settlement conferences with judges not assigned to the case were more likely to make good use of the parties' resources than mediation with volunteer mediators.¹⁰⁶ There were no differences in ratings between the two types of judges, between judges assigned to the case and volunteer mediators, or between private mediators and either type of judge.

Table 11 Neutrals make good use of parties' resources	disagree strongly	disagree some- what	neither agree nor disagree	agree some- what	agree strongly	mean
judges assigned to case	2%	8%	27%	38%	25%	3.75
judges not assigned to case	0%	4%	28%	45%	22%	3.85
court staff mediators	1%	1%	18%	41%	39%	4.17
volunteer mediators	2%	9%	32%	37%	20%	3.64
private mediators	2%	3%	24%	46%	25%	3.87

Lawyers' ratings on this dimension do not simply reflect the cost to the parties of using the different settlement procedures. Although parties did not pay to use any of the court-connected settlement procedures, the lawyers nonetheless differentiated among them when assessing whether they made good use of the parties' resources. Lawyers apparently saw mediation with staff mediators as providing greater benefits than any other court-connected settlement procedure.

G. Overall Preference Rankings of the Settlement Procedures

Lawyers were asked to rank the five models of settlement conferences and mediation in order of preference, based on their general experience with

¹⁰⁵ Judges assigned, $t(125) = 4.55$, $p < .001$; judges not assigned, $t(115) = 3.95$, $p < .001$; volunteer mediators, $t(117) = 5.33$, $p < .001$; private mediators, $t(120) = 3.37$, $p < .01$.

¹⁰⁶ Private mediators, $t(114) = 2.24$, $p < .05$; judges not assigned, $t(111) = 2.34$, $p < .05$.

these procedures in federal courts.¹⁰⁷ While the prior ratings provided lawyers' perceptions of the degree to which each settlement procedure model possessed certain characteristics, these rankings instead indicate lawyers' judgments about their relative preferences among the models. Thus, these rankings are likely to reflect the importance or value that the lawyers assign to those characteristics, as well as to other aspects of the procedures not examined in the present survey.

Lawyers ranked the five settlement procedures in order of overall preference, from most to least preferred, as follows: mediation with staff mediators, settlement conferences with judges not assigned to the case, mediation with private mediators, settlement conferences with judges assigned to the case, and mediation with volunteer mediators (see Table 12).

Table 12 Lawyers' Preference Rankings of the Settlement Procedures	first	second	third	fourth	fifth	mean
court staff mediators	52%	28%	14%	5%	1%	1.77
judges not assigned to case	16%	26%	38%	15%	5%	2.67
private mediators	18%	27%	18%	28%	8%	2.81
judges assigned to case	28%	12%	16%	24%	20%	2.97
volunteer mediators	6%	8%	14%	23%	49%	4.01

Mediation with staff mediators received the largest proportion of first-place rankings and the fewest fifth-place rankings, and had a higher average ranking than each of the other settlement procedures.¹⁰⁸ Conversely, mediation with volunteer mediators had by far the smallest proportion of first-place rankings and the largest proportion of fifth-place rankings, and

¹⁰⁷ The question was phrased: "We would like to know which type of settlement or mediation conference you generally prefer. Please rank the following in order of your preference, with 1 being the most preferred." Approximately twenty lawyers did not rank the conference types, but instead simply checked one of the options. We interpreted those checks as indicating the type of conference they preferred, and recorded a rank of "1" for the conference type they had checked and no rankings for the other conference types. As a result, each rank does not sum to 100%.

¹⁰⁸ Judges assigned, $t(111) = 6.16, p < .001$; judges not assigned, $t(103) = 5.01, p < .001$; volunteer mediators, $t(104) = 16.08, p < .001$; private mediators, $t(107) = 5.68, p < .001$.

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had a lower mean ranking than each of the other settlement procedures.¹⁰⁹ Settlement conferences with judges not assigned to the case had a higher average ranking than did settlement conferences with judges assigned to the case.¹¹⁰ It is worth noting that lawyers' views on settlement conferences with judges assigned to the case were split: this procedure had the second largest proportion of first-place rankings, but also the second largest proportion of fifth-place rankings. The mean ranking of private mediation did not differ from the mean rankings of either type of judicial settlement conference.

The order of preference rankings of the five settlement procedures is largely, though not entirely, consistent with the relative ordering of the settlement procedures based on lawyers' ratings on the eleven specific dimensions. Mediation with staff mediators was rated higher than each of the other court-connected settlement procedures on a majority of dimensions. Settlement conferences with judges not assigned to the case were rated higher than settlement conferences with judges assigned to the case on a majority of dimensions. Mediation with staff or private mediators was rated higher than mediation with volunteer mediators on a majority of dimensions. Volunteer mediation, however, fared substantially worse relative to both types of judicial settlement conferences in this overall preference ranking than in the ratings of the individual dimensions, where volunteer mediators were rated higher than judges on approximately the same number of dimensions as rated lower. This might suggest that characteristics of the settlement procedure models that were not assessed in the present survey influenced lawyers' preference rankings. Overall, the pattern of procedural preferences suggests that no single dimension, such as the neutral's credibility, was assigned such great value that it disproportionately affected lawyers' preferences relative to the other dimensions.¹¹¹

Judges in the Southern District of Ohio also were surveyed about their views of these five settlement procedures. Seventy-five percent of the responding judges rated mediation with the staff mediator as the most effective (defined as "likely to result in an agreement satisfactory to all sides"), and sixty percent rated it as the most professional (defined as "thorough and skillful") of the procedures.¹¹²

¹⁰⁹ Judges assigned, $t(103) = 3.96$, $p < .001$; judges not assigned, $t(98) = 8.12$, $p < .001$; staff mediators, $t(104) = 16.08$, $p < .001$; private mediators, $t(101) = 7.51$, $p < .001$.

¹¹⁰ $t(100) = 2.39$, $p < .05$.

¹¹¹ Cf. RELIS, *supra* note 96, at 207 (stating that lawyers considered credibility the most important mediator attribute).

¹¹² See Letter, *supra* note 73.

IV. IMPLICATIONS OF THE RESEARCH FINDINGS FOR DECISIONS ABOUT COURT-CONNECTED SETTLEMENT PROCEDURES

In this part, we explore the implications of that present research and other empirical studies have for courts' choices among the different settlement procedure models. Given that a "central task" in the administration of justice is "ensuring the quality" of the settlement procedures that courts provide,¹¹³ we place greater emphasis on model characteristics that are likely to contribute to process quality.¹¹⁴

A set of fundamental components of process quality emerges from model codes of conduct and standards for judges and mediators. Principal among them are the neutral's impartiality, lack of bias, and avoidance of impropriety,¹¹⁵ as well as the lack of settlement pressure or coercion.¹¹⁶

¹¹³ Marc Galanter & Mia Cahill, "*Most Cases Settle*": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1390–91 (1994); *see also* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.12(A); CENTER FOR DISPUTE SETTLEMENT AND THE INSTITUTE OF JUDICIAL ADMINISTRATION, STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standards 2.1, 6.1, 6.3, 6.5, 6.6 & cmts. (1992) [hereinafter STANDARDS FOR MEDIATION PROGRAMS]; Brazil, *supra* note 84, at 241 (noting that the "dominant concern" of the court, and the "primary objective" of neutrals serving in court-connected settlement procedures," must be to promote and preserve public confidence in the integrity of the processes that the [court] sponsors").

¹¹⁴ There is a general consensus that settlement procedures should be assessed by the quality of the process and the settlements achieved, not only by the number of settlements produced. *See* STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, Standard 11.4; Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 NEGOTIATION J. 329, 330–31 (1995); Galanter & Cahill, *supra* note 113, at 1388; Senft & Savage, *supra* note 8, at 301–302; Menkel-Meadow, *supra* note 1, at 514; Brazil, *supra* note 6, at 730, 797–98. The findings of one study illustrate the potential disconnect between the quantity and quality of settlements. Although 85% of lawyers thought that federal judges' involvement in settlement discussions was likely to improve the chances of settlement, only 46% thought it would "significantly increase the likelihood that settlements will be fair to all concerned." BRAZIL, *supra* note 14, at 1, 56.

¹¹⁵ *See* MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, Rule 1.2 & cmts. ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); *see also id.* R. 2.2, 2.3, 2.6(B), 2.11(A) & cmts.; CODE OF CONDUCT FOR UNITED STATES JUDGES, Canons 2A, 3 (2009); AMERICAN ARBITRATION ASSOCIATION ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (2005), available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf [hereinafter MODEL STANDARDS FOR MEDIATORS]; STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, Standards 8.1a & cmts.; CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ADR, MODEL RULE FOR THE LAWYER AS THIRD-PARTY

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Other important elements of process quality include the neutral's thoroughness, timeliness, devoting the necessary time and attention to the matter, and ensuring the parties are fully heard;¹¹⁷ having the necessary knowledge, skill, expertise, and experience;¹¹⁸ and treating the parties with dignity and respect.¹¹⁹ For mediators, there are additional standards involving confidentiality and reporting to the court.¹²⁰ Empirical procedural justice research has found that a largely similar set of characteristics—the neutral's impartiality and lack of bias, allowing parties to fully present their evidence and views and giving them thorough consideration, and treating the

NEUTRAL, R. 4.5.3, 4.5.6 & cmts. (2002) [hereinafter MODEL RULE FOR NEUTRALS]; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT, Prefatory Note at 9 (2003) (noting that “the credibility and integrity of the mediation process is almost always dependent upon the neutrality and the impartiality of the mediator”) [hereinafter UMA].

¹¹⁶ See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.6(B) & cmts.; CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 115, cmt. to Canon 3A(4); MODEL STANDARDS FOR MEDIATORS, *supra* note 115, Standard I; MODEL RULE FOR NEUTRALS, *supra* note 115, Rule 4.5.1 & cmt. 3, R. 4.5.6(d) & cmts; STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, Standard 5.1.b, 8.1.f, 11.5 & cmts; UMA, *supra* note 115, § 7 & cmts. The codes do not distinguish between overt coercion by the neutral and coercion resulting from the structure of the procedure itself. Party self-determination, a fundamental principle in mediation, encompasses but is broader than lack of settlement pressure. See MODEL STANDARDS FOR MEDIATORS, *supra* note 115, Standard I; McAdoo & Welsh, *supra* note 6, at 33; UMA, *supra* note 115, Prefatory Note at 10–11; Welsh, *supra* note 82, at 17–20.

¹¹⁷ See CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 115, Canon 3A(4); MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.5(A) & cmts.; MODEL STANDARDS FOR MEDIATORS, *supra* note 115, Standard VI.A.1; MODEL RULE FOR NEUTRALS, *supra* note 115, R. 4.5.1(a) & cmts.

¹¹⁸ See, e.g., MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.5(A) & cmts.; CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 115, Canon 3A(1); MODEL RULE FOR NEUTRALS, *supra* note 115, R. 4.5.1 cmt.; STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, Standard 6.1 & cmts.

¹¹⁹ See, e.g., MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.8(B) & cmts.; CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 115, Canon 3A(3) & cmts.; MODEL RULE FOR NEUTRALS, *supra* note 115, R. 4.5.3(a)(1) & cmts.

¹²⁰ See, e.g., MODEL STANDARDS FOR MEDIATORS, *supra* note 115, Standard V; UMA, *supra* note 115, §§ 4–8 & cmts.; MODEL RULE FOR NEUTRALS, *supra* note 115, R. 4.5.2; STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, Standards 5.1.b, 8.1.e, 9.1, 9.4, 12.1, 12.2, 12.3 & cmts. The UMA does not apply to mediations conducted by judges who might make later rulings in the case, consistent with its prohibition on mediator reports to the court. *Id.* § 3(b)(3) & cmt.

parties with dignity and respect—contributes to process fairness.¹²¹ Process fairness is important not only because it is an essential feature of quality settlement procedures¹²² but also because it contributes to participants' general perceptions of the courts' fairness and legitimacy.¹²³

We first discuss the two judicial settlement conference models: conferences conducted by judges assigned to the case and conferences conducted by judges not assigned to the case. Next, we consider the two court-connected mediation models: mediation with staff mediators and mediation with volunteer mediators. Finally, we compare the judicial settlement conference model and the mediation model that lawyers viewed as the most likely to have attributes that they considered contribute to process quality and fairness: settlement conferences conducted by judges not assigned to the case and mediation with staff mediators.

A. Judicial Settlement Conferences: Which Judge?

The research findings lend support to arguments that settlement conferences should not be conducted by judges who will make subsequent substantive decisions in the case, given the paramount importance of judicial impartiality, avoiding the appearance of impropriety, and non-coercive settlements.¹²⁴ Lawyers in the present study thought that judges assigned to

¹²¹ See LIND & TYLER, *supra* note 54, at 101–06, 214–17; Tyler & Lind, *supra* note 54, at 75–77, 84; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?* 79 WASH. U. L.Q. 787, 820–23 (2001); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 344–46 (1995); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 449–51 (2010) [hereinafter Wissler, *Representation*].

¹²² See, e.g., MODEL STANDARDS FOR MEDIATORS, *supra* note 115, Standard VI(A); MODEL RULE FOR NEUTRALS, *supra* note 115, Rule 4.5.6 & cmts.; STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, commentary associated with Standard 16.1; Sheppard, *supra* note 54, at 169–70; Tyler & Lind, *supra* note 54, at 73–74.

¹²³ See LIND & TYLER, *supra* note 54, at 64–66, 76–78, 207–11; Tyler & Lind, *supra* note 54, at 65, 68–69, 71; Welsh, *supra* note 121, at 818, 820; Wissler, *supra* note 121, at 346.

¹²⁴ See CIVIL TRIAL PRACTICE STANDARDS § 23(c)(ii) & cmts. (2007) [hereinafter TRIAL PRACTICE STANDARDS]; Alfini, *supra* note 1, at 13; Baer, *supra* note 8, at 150–51; Cratsley, *supra* note 13, at 571, 585–86; Menkel-Meadow, *supra* note 1, at 511; Resnik, *supra* note 1, at 641–44; Sander, *supra* note 63, at 11, 24; Tornquist, *supra* note 63, at 760, 773; Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information: The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1259, 1325–26 (2005). Similar arguments have been made against mediation-arbitration (hereinafter “med-arb”)

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the case were much more biased than judges not assigned to the case.¹²⁵ Lawyers in the present study also thought that parties were far less able to candidly discuss the case and fully explore settlement with judges assigned to the case, without there being possible negative consequences or prejudice to ongoing litigation.¹²⁶ In another study, a majority of lawyers also thought that they would be less open in settlement discussions with the trial judge than with another judge in a non-jury case, and they were more likely to think it was improper for the trial judge to be involved in settlement discussions in non-jury matters.¹²⁷ Judges in another study acknowledged that active involvement in settlement could prejudice them for a forthcoming bench trial, and many of the judges and lawyers in that study thought that it was inappropriate for trial judges to be involved in settlement discussions in a non-jury case.¹²⁸

Although lawyers are unlikely to think that statements made during settlement conferences will be used in evidence,¹²⁹ they might nonetheless

with a single neutral under most circumstances. See, e.g., AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 38 (2007) [hereinafter AAA DRAFTING CLAUSES], available at <http://www.adr.org/si.asp?id=4125>; Gerald F. Phillips, *The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, but Party Sophistication Is Mandatory*, 26 ALTERNATIVES HIGH COST LITIG. 101, 103 (May, 2008) (finding that only 38% of surveyed commercial arbitrators and mediators, some of whom had served as the single neutral in med-arb, endorsed a blanket recommendation of med-arb in which the same person served as both mediator and arbitrator).

¹²⁵ See *supra* note 68 and accompanying text.

¹²⁶ See *supra* notes 57 and 60 and accompanying text.

¹²⁷ BRAZIL, *supra* note 14, at 85, 92, 138–39. Judges interviewed in another study had mixed views of whether parties would fully disclose to the trial judge. D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 26 (1986).

¹²⁸ James A. Wall & Dale E. Rude, *Judges' Mediation of Settlement Negotiations*, 72 J. APPLIED PSYCHOL. 234, 235, 238 (1987). Judges said they were very reluctant to “mediate” settlement negotiations when they would be presiding at a bench trial, but would “mediate strongly” if another judge would be trying the case because their prejudices would be of little consequence in the latter situation. *Id.* at 235. However, when the researchers gave the judges several case scenarios and asked them how strongly they would try to facilitate settlement and which techniques they would use, their responses were the same regardless of whether they or a different judge would be deciding the case at trial. *Id.* at 238.

¹²⁹ See FED. R. EVID. 408 (noting that statements made during settlement negotiations are inadmissible in subsequent proceedings). Encouraging the full exchange of information and reducing parties’ tendency to negotiate strategically are goals that underlie Rule 408. See Killefer, *supra* note 3, at 19; Wistrich et al., *supra* note 124, at 1292.

fear that the information discussed will affect subsequent rulings and decisions when the judge assigned to the case conducts the settlement conference.¹³⁰ These fears could constrain settlement discussions by making the parties reluctant to fully disclose information¹³¹ or by encouraging parties to exaggerate their demands and emphasize the strengths of their claims while minimizing the weaknesses of their claims in an effort to obtain more favorable outcomes if the case goes to trial.¹³²

The full exploration of settlement may also be curtailed if lawyers feel pressured to settle in order to avoid potential unfavorable rulings as punishment for non-settlement.¹³³ Concerns about punishment for non-settlement might stem from the view that judges generally are eager to settle cases in order to reduce their trial dockets.¹³⁴ Lawyers' concerns might be

¹³⁰ See, e.g., Brunet, *supra* note 26, at 246, 258; Killefer, *supra* note 3, at 19; Sander, *supra* note 63, at 11. Judges are likely to hear more and different types of information in settlement conferences than they would normally hear during the course of litigation. See Resnik, *supra* note 63, at 408, 427.

¹³¹ See Brunet, *supra* note 26, at 246, 248, 251; Deason, *supra* note 65, at 1409, 1413–15 (noting that because there are risks involved in sharing information during negotiations, parties need to trust the settlement procedure and the neutral in order to encourage the sharing of information); Killefer, *supra* note 3, at 19; Otis & Reiter *supra* note 8, at 395–96; Sander, *supra* note 63, at 11.

¹³² See, e.g., Resnik, *supra* note 63, at 423 (noting that some lawyers use every occasion with the judge to argue their case). Commentators have expressed similar concerns about strategic and less candid settlement discussions in med-arb when the same person serves both as mediator and arbitrator. See, e.g., AAA DRAFTING CLAUSES, *supra* note 124, at 38; David C. Elliott, *Med/Arb: Fraught with Danger or Ripe with Opportunity?*, 34 ALTA. L. REV. 163, 179 (1995); William H. Ross & Donald E. Conlon, *Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration*, 25 ACAD. MGMT. REV. 416, 419–21 (2000). See generally Phillips, *supra* note 124 (reporting that the commercial mediators and arbitrators surveyed noted that they had experienced issues of lack of candid discussions and concerns about the improper use of information in med-arb when the same neutral would later preside over the same case when it went to trial).

¹³³ See, e.g., BRAZIL, *supra* note 14, at 67; Brunet, *supra* note 26, at 247; Cratsley, *supra* note 13, at 576, 591–92; Killefer, *supra* note 3, at 19; Resnik, *supra* note 63, at 425. Lawyers might be concerned that angering the judge could result in unfavorable rulings in the instant case and future cases. See Sander, *supra* note 63, at 22; Tornquist, *supra* note 63, at 752–53, 771–72.

¹³⁴ See Alfini, *supra* note 1, at 13; Brunet, *supra* note 26, at 247; Cratsley, *supra* note 13, at 572; Resnik, *supra* note 1, at 644 (noting that, in criminal cases, “[F]ederal judges are precluded from participating in the negotiations to avoid either the fact or impression that they favor settlement in general or a particular agreement”); Tornquist, *supra* note 63, at 771–72. Half of surveyed lawyers thought that judges do not like taking cases to trial. ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL

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heightened if the trial judge gave his opinion of the appropriate settlement range during the settlement conference, especially if he said that the parties would be unreasonable if they did not settle in that range.¹³⁵ One side in particular might feel pressured to settle if the evaluations the judge made or the signals he sent about his views of the case suggested that his likely decision would be unfavorable to them.¹³⁶ The opinions and recommendations of neutrals who have the power to ultimately decide the case are likely to have more force than those of other neutrals.¹³⁷ Thus, even if the judge does not overtly push parties to settle during the conference,¹³⁸ settlement pressure is likely to be inherent in the structure of a settlement procedure conducted by the ultimate decisionmaker.¹³⁹

In addition to concerns about the potential prejudicial effect specific information will have on subsequent decisions, lawyers might be concerned that a more general bias will result from the trial judges' participation in settlement conferences.¹⁴⁰ Lawyers might be concerned that judges form

REPORT 131 (Dec. 11, 2009), available at http://www.americanbar.org/content/dam/aba/migrated/litigation/survey/docs/report_aba_report.authcheckdam.pdf.

¹³⁵ See, e.g., BRAZIL, *supra* note 14, at 92 (finding that lawyers were less likely to say they would be open in settlement conferences conducted by the trial judge in districts where judges were more aggressive during settlement conferences than in districts where judges were less aggressive); Brunet, *supra* note 26, at 247; Cratsley, *supra* note 13, at 591–92; Killefer, *supra* note 3, at 19, 20, 22; Sander, *supra* note 63, at 22; Tornquist, *supra* note 63, at 752–53.

¹³⁶ See, e.g., BRAZIL, *supra* note 14, at 67; Brazil, *supra* note 84, at 262–65; Killefer, *supra* note 3, at 20.

¹³⁷ See, e.g., Killefer, *supra* note 3, at 19, 21; Neil B. McGillicuddy et al., *Third-Party Intervention: A Field Experiment Comparing Three Different Models*, 53 J. PERSONALITY & SOC. PSYCHOL. 104, 105 (1987); Otis & Reiter, *supra* note 8, at 369–70; Phillips, *supra* note 124, at 103 (reporting that the surveyed mediators and arbitrators noted that because mediators in med-arb have more leverage and their suggestions are given more deference if they will ultimately arbitrate the case, they have “to be careful about being perceived as opining on the issue”); Resnik, *supra* note 63, at 425, 435; Tornquist, *supra* note 63, at 753.

¹³⁸ See Cratsley, *supra* note 13, at 575 (noting that “several state judicial conduct organizations have reported receiving complaints of judicial coercion and intimidation in settlement conferences”); Killefer, *supra* note 3, at 22. Any neutral can become invested in resolving a case and pressure the parties to settle. See, e.g., Brazil, *supra* note 84, at 244–48; Cratsley, *supra* note 13, at 592; Tornquist, *supra* note 63, at 773.

¹³⁹ See, e.g., Alfini, *supra* note 1, at 14; Tornquist, *supra* note 63, at 752–53.

¹⁴⁰ See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.6 & cmts. 2, 3; Phillips, *supra* note 124, at 102 (reporting that the surveyed commercial mediators and arbitrators noted that it is hard to avoid the appearance of favoring one side when

opinions about a case based on the limited evidence presented during the conference, and that these opinions would prevent judges from listening to the more complete evidence and arguments presented during motions or at trial with an open mind.¹⁴¹ Also, the possibility that the judge's views were based on selective or one-sided information provided by the other side during a private caucus could lead lawyers to question the judge's impartiality at trial and the propriety of subsequent decisions.¹⁴²

Lawyers might have the strongest concerns about bias at trial if, during the settlement conference, the judge expressed opinions about the parties' positions or evidence, assessed the strengths and weaknesses of the case, suggested a dollar range for settlement, or predicted the likely outcome at trial.¹⁴³ The party who received the less favorable assessment might think the

arbitrating the case after mediating it); Resnik, *supra* note 63, at 427, 430 (having "pressed for settlement, judges can hardly be considered untainted if they are ultimately asked to find the facts and adjudicate the merits of a dispute"). Lawyers might be concerned that they way judges view them or their clients could create bias in the instant case and future cases. *See, e.g.*, Sander, *supra* note 63, at 22; Tornquist, *supra* note 63, at 752-53, 771-72.

¹⁴¹ *See, e.g.*, BRAZIL, *supra* note 14, at 67; Brunet, *supra* note 26, at 248; Cratsley, *supra* note 13, at 576, 581; Ravindra, *supra* note 39, at 300-01; Resnik, *supra* note 63, at 408, 427, 433; William H. Ross et al., *The Impact of Hybrid Dispute-Resolution Procedures on Constituent Fairness Judgments*, 32 J. APPLIED SOC. PSYCHOL. 1151, 1155 (2002) (quoting Lon Fuller, "If a person who has mediated unsuccessfully attempts to assume the role of arbitrator . . . [i]t will be hard for him to listen to proofs and arguments with an open mind. If he fails in this attempt, the integrity of adjudication is impaired").

Some commentators note, however, that judges are likely to form views of the parties or the lawyers and opinions of the case during the course of the litigation, even if they do not conduct settlement conferences. *See, e.g.*, Baer, *supra* note 8, at 146-47; Resnik, *supra* note 63, at 427.

¹⁴² *See, e.g.*, Resnik, *supra* note 63, at 427, 433; *see also* Brazil, *supra* note 84, at 236 (noting that, as a magistrate judge conducting settlement conferences, he spent most of his time in private caucuses); McGillicuddy et al., *supra* note 137, at 111 (finding there was a higher rate of accusations and character assassination attempts in private caucuses than in joint mediation sessions). The potential biasing effect on subsequent decisions resulting from information learned during settlement discussions also has been raised in the context of med-arb with a single neutral. *See, e.g.*, AAA DRAFTING CLAUSES, *supra* note 124, at 38; Elliott, *supra* note 132, at 166-67, 178; McGillicuddy et al., *supra* note 137, at 111; Phillips, *supra* note 124, at 103 (finding that a majority of the surveyed commercial mediators and arbitrators were concerned that arbitrators might be unfairly influenced by evidence they heard from one party in a private caucus during mediation).

¹⁴³ *See, e.g.*, BRAZIL, *supra* note 14, at 67 (noting that a judge who gives an opinion on the settlement value "is in essence announcing his final judgment before the trial begins"); NIEMIC ET AL., *supra* note 3, at 80 n.203 (noting that some local rules prohibit the assigned judge "from discussing settlement figures in nonjury cases, unless requested

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judge is biased against them.¹⁴⁴ Lawyers in one study were much more likely to think it was improper for a trial judge suggest a reasonable settlement value to lawyers during a settlement conference in a non-jury case than for a settlement judge to do so.¹⁴⁵ Even if the judge does not explicitly offer his views, he may nonetheless send signals to the parties based on his reactions to the evidence and arguments.¹⁴⁶ Thus, although lawyers want judges to be active and evaluative during settlement conferences, they worry that such involvement might affect the impartiality of the judge during the trial.¹⁴⁷

To date, there is a lack of empirical evidence showing that in the litigation context, having the same neutral serve in the role of settlement facilitator and ultimate decisionmaker constrains negotiations or increases settlement pressures. The one study that examined the effect of having the same person versus different people serve as mediator and arbitrator in med-arb in a community mediation center reported somewhat mixed findings.¹⁴⁸ That study found that when mediators were going to serve as the arbitrator, they were more active and engaged in more efforts to influence the course of mediation.¹⁴⁹ There were no differences between med-arb with the same neutral versus different neutrals in the parties' hostile and contentious behavior during mediation, the number of concessions, the parties' expressed desire to impress or follow the mediator, the parties' ratings of the mediation process, or whether the case settled, but the parties made more new proposals when the mediator would arbitrate the case.¹⁵⁰ There were several methodological problems that might have limited the observed differences between the models,¹⁵¹ and the many differences between the community mediation and general civil settings¹⁵² make it unclear whether similar findings would be seen in the present setting.

to do so by all concerned parties"); Cratsley, *supra* note 13, at 576, 588; Killefer, *supra* note 3, at 19–20.

¹⁴⁴ See, e.g., Brazil, *supra* note 84, at 265–67; Killefer, *supra* note 3, at 19, 20.

¹⁴⁵ BRAZIL, *supra* note 14, at 152, 154.

¹⁴⁶ See Brazil, *supra* note 84, at 262–65; Brunet, *supra* note 26, at 252.

¹⁴⁷ See BRAZIL, *supra* note 14, at 92–93.

¹⁴⁸ See McGillicuddy et al., *supra* note 137, at 106–10.

¹⁴⁹ *Id.* at 109–10.

¹⁵⁰ *Id.* at 106–10.

¹⁵¹ *Id.* at 108, 111. These included that the parties sometimes did not seem to understand which procedure they were in, and the mediators were accustomed to serving as the arbitrator and might not have altered their mediation approach during the study. *Id.*

¹⁵² These include the nature of the disputes, the characteristics of the parties and whether they were represented, and the neutrals' training and approach. See *id.* at 106 n.1, 111; Wissler, *supra* note 7, at 62–64, 71–73.

As the present study shows, lawyers clearly believe that settlement discussions will be less open and full when conducted by the judge assigned to the case,¹⁵³ and such beliefs are likely to affect the negotiation behavior of the parties.¹⁵⁴ If parties do not have the chance to fully present information and express their views, they are less likely to feel the process is fair.¹⁵⁵ Additionally, if the parties withhold information or engage in strategic negotiation behavior, the neutral will be less able to help them identify issues, explore options, overcome barriers,¹⁵⁶ and fashion an agreement that meets their interests and concerns in an integrative or creative way.¹⁵⁷

Moreover, empirical research has confirmed lawyers' fears that judges will be unable to disregard inadmissible and potentially prejudicial information of the type they are likely to hear in settlement conferences. In one study, judges read a personal injury case scenario in which they were asked to assume the role of a judge who presided over a settlement conference and ultimately decided the case when it did not settle.¹⁵⁸ The judges' awards differed depending on whether they had learned during the settlement conference that the plaintiff was seeking a low dollar amount or a high dollar amount, or whether they had not learned the dollar amount of the demand.¹⁵⁹ In another case scenario in the same study, judges who learned during a pretrial discovery hearing that the plaintiff knew that the basis of his claim was a lie were less likely to find for the plaintiff in a subsequent trial than were judges who did not learn this information.¹⁶⁰

¹⁵³ See *supra* note 57 and 60 and accompanying text.

¹⁵⁴ See DAVID G. MYERS, SOCIAL PSYCHOLOGY 128, 130 (5th ed. 1996) (noting that attitudes predict behavior when the attitudes are specific and relevant to the situation and when they are derived from experience); *infra* note 166, 168 (discussing how expectations and beliefs affect behavior).

¹⁵⁵ LIND & TYLER, *supra* note 54, at 101–06, 215–17; Tyler & Lind, *supra* note 54, at 75–77, 84; Wissler, *supra* note 121, at 344–46; Welsh, *supra* note 121, at 820; Wissler, *Representation*, *supra* note 121, at 449–51.

¹⁵⁶ See STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, cmts. to 8.1.e, 9.1; UMA, *supra* note 115, Prefatory Note at 8–9; BRAZIL, *supra* note 14, at 92; Sander, *supra* note 63, at 11, 22; Deason, *supra* note 65, at 1410–13; Brunet, *supra* note 26, at 251.

¹⁵⁷ See Ross & Conlon, *supra* note 132, at 422 (“The revealing of more information is associated with a greater probability of achieving an integrative, high-quality agreement.”); Sander, *supra* note 63, at 11, 22; Deason, *supra* note 65, at 1410–13.

¹⁵⁸ Wistrich et al., *supra* note 124, at 1288–89. The judges were reminded that settlement discussions were inadmissible before they awarded damages. *Id.*

¹⁵⁹ *Id.* at 1289–91.

¹⁶⁰ *Id.* at 1294–97. Some of the judges said they would have recused themselves in this situation. *Id.* at 1297. The researchers found that judges also were “influenced by

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In another study involving a product liability case scenario, judges who learned that another judge had previously ruled on the defendant's motion to exclude evidence of subsequent remedial measures thought that: the defendant was not credible, the plaintiff's claim had greater merit, and that the defendant was liable than were judges who had not heard that evidence.¹⁶¹ These findings illustrate why it is difficult to disregard such information—because it “changes how we think. It creates beliefs that can guide the integration and assessment of subsequent information.”¹⁶² Thus, these studies show that the information judges learn during settlement conferences can alter their views of the claims and the parties and affect their subsequent decisions.¹⁶³

In addition, lawyers' fears that judges' subsequent decisions are likely to be influenced by the opinions they form during the settlement conference are supported by a substantial body of research on a psychological phenomenon that has been given a number of names, including expectancy effects, perceptual set, context effects, and observer effects.¹⁶⁴ People tend to draw “selectively from the available evidence and focus on those items that confirm the working hypothesis” (“selective attention”)¹⁶⁵ and “seek and interpret information that confirms existing beliefs” (“confirmation bias”).¹⁶⁶ For example, a study found that whether investigative interviewers were led to believe or to doubt the person they were about to interview affected “the

relevant but inadmissible information” in several other civil and criminal case contexts. *Id.* at 1251–52.

¹⁶¹ Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effects of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 122–25 (1994). The judges themselves, however, underestimated the effects that such information would have on them; they “felt that judicial bias due to information divulged in a preliminary hearing was a fairly weak concern . . . and that a judge trying a lawsuit will be able to disregard evidence he or she has ruled inadmissible.” *Id.* at 125.

¹⁶² Wistrich et al., *supra* note 124, at 1265; *see also*, e.g., Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damages Awards*, 6 J. EXPERIMENTAL PSYCH.: APPLIED 91, 100–01 (2000) (finding that the plaintiffs' ad damnum requests and defense rebuttal amounts affected the boundaries of what mock jurors viewed as acceptable awards, as well as their awards); *infra* notes 168? and accompanying text (discussing how expectancy effects influence decisions and behavior).

¹⁶³ Wistrich et al., *supra* note 124, at 1323.

¹⁶⁴ *See* D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1, 12–16 (2002).

¹⁶⁵ *Id.* at 15.

¹⁶⁶ *Id.* at 7 n.22.

interview structure, the questions posed, and other aspects of interviewing behavior of the investigators.”¹⁶⁷ Expectations also have been found to affect decision thresholds.¹⁶⁸ Thus, the views judges form of the case during the settlement conference can influence how they conduct later hearings and the trial, how they perceive and interpret information that they hear during those proceedings, and the thresholds they use to make their decisions. As a result, judges’ subsequent decisions are likely to be influenced by the expectations they have that were formed by the settlement conference.

Given the importance of judicial impartiality, the avoidance of the appearance of impropriety, and the non-coercion of settlements for process fairness and quality, there are substantial advantages to settlement conferences conducted by judges not assigned to the case. The present study found several additional benefits associated with settlement conferences conducted by judges not assigned to the case. Although the differences were small, judges not assigned to the case were more likely than judges assigned to the case to be seen as incorporating clients meaningfully into the settlement process and as being able to devote a sufficient amount of time to settlement, both of which are likely to enhance the quality and fairness of the settlement process.¹⁶⁹ Lawyers also thought that settlement conferences with judges not assigned to the case were more likely to leave clients feeling well served, regardless of the outcome, than were conferences with judges assigned to the case.¹⁷⁰ The two types of judges were rated similarly on whether they provided useful input, helped manage difficult parties, responded timely, and made good use of parties’ resources.

In the present study, only one advantage was associated with conferences conducted by judges assigned to the case: they were seen as having more credibility regarding settlement considerations than were judges not assigned to the case.¹⁷¹ A suggested additional benefit of having the trial judge conduct settlement conferences that was not addressed in the present study is that there could potentially be greater efficiency, especially in complex cases, because the judge assigned to the case presumably is already familiar with

¹⁶⁷ *Id.* at 15.

¹⁶⁸ *Id.* at 16.

¹⁶⁹ See *supra* notes 76, 81 and accompanying text and *infra* notes 188–91 and accompanying text.

¹⁷⁰ See *supra* note 103 and accompanying text.

¹⁷¹ See *supra* note 89 and accompanying text.

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the issues and evidence.¹⁷² Notwithstanding the importance that lawyers seem to assign to credible case analysis in settlement procedures,¹⁷³ lawyers in the present study apparently did not think that this or other attributes of conferences with judges assigned to the case outweighed the advantages of conferences with judges not assigned to the case, as they, on average, gave the latter higher overall preference rankings.¹⁷⁴

It is likely that courts will vary in the degree to which they view the two models of judicial settlement conferences as being different. The differences might be smallest in courts in which magistrate judges decide substantive pretrial matters or in which settlement conferences are conducted by other district judges rather than by magistrate judges. The differences might be largest in courts in which magistrate judges primarily conduct settlement conferences, or in which settlement conferences with judges not assigned to the case have explicit provisions limiting or prohibiting discussions with the trial judge.¹⁷⁵

Fewer concerns have been expressed about judges assigned to the case conducting settlement conferences when a jury will decide the case.¹⁷⁶ One study found that lawyers were less likely to think it was improper for the assigned judge to be involved in settlement discussions or to tell the lawyers

¹⁷² See, e.g., NIEMIC ET AL., *supra* note 3, at 80; Resnik, *supra* note 63, at 434. The same point has been made with regard to med-arb with a single neutral. See, e.g., Ross et al., *supra* note 141, at 1154.

¹⁷³ Other studies have shown that civil litigators thought that it was helpful or important for the neutral, in mediation or in settlement conferences, to analyze and evaluate the merits of the case, to suggest appropriate settlement options, and to recommend specific settlements. See *MEDIATION QUALITY*, *supra* note 96, at 10–11; *BRAZIL*, *supra* note 14, at 49–50, 69, 86–87; *McAdoo & Hinshaw*, *supra* note 83, at 524; *RELIS*, *supra* note 96, at 205, 207, 224; *Wall & Rude*, *supra* note 14, at 197–98. Lawyers noted, however, that there were times that analyzing the case or providing specific settlement recommendations was inappropriate or improper. See *MEDIATION QUALITY*, *supra* note 96, at 14; *BRAZIL*, *supra* note 14, at 65, 67.

¹⁷⁴ See *supra* note 110 and accompanying text; see also *BRAZIL*, *supra* note 14, at 85 (concluding that “the lawyers’ net assessment of both effectiveness and propriety is substantially more positive when the judge involved [in discussing settlement] has no other contact with the case”).

¹⁷⁵ See also NIEMIC ET AL., *supra* note 3, at 76.

¹⁷⁶ See, e.g., *MODEL CODE OF JUDICIAL CONDUCT*, *supra* note 72, R. 2.6, cmt. 2 (listing “whether the case will be tried by the judge or a jury” as “[a]mong the factors that a judge should consider when deciding upon an appropriate settlement practice for a case”); *TRIAL PRACTICE STANDARDS*, *supra* note 124, § 23(c)(i) & cmts.; NIEMIC ET AL., *supra* note 3, at 79 (citing an advisory opinion of the Judicial Conference’s Committee on Codes of Conduct); *Cratsley*, *supra* note 13, at 587; *Killefer*, *supra* note 3, at 18–19; *Parness*, *supra* note 25, at 1904–05; *Wistrich et al.*, *supra* note 124, at 1327.

his views of the dollar range of reasonable settlement in a jury case than in a non-jury case.¹⁷⁷ Judges in other studies said they were more likely to share their views of the merits or appropriate settlement figures¹⁷⁸ or to “mediate” strongly if a jury subsequently would be deciding the case than if they would be presiding at a bench trial because there would be fewer deleterious effects of prejudice from the settlement negotiations.¹⁷⁹ When the researchers gave judges several case scenarios and asked them how strongly they would try to facilitate settlement and which techniques they would use, however, the judges’ responses were the same regardless of whether they or a jury would decide the case at trial.¹⁸⁰

Even if the case were to be decided by a jury, the trial judge’s views based on information learned during the settlement conference nonetheless could affect the procedural, evidentiary, and other rulings that the trial judge must make before, during, and after the trial, which in turn could affect the outcome of the case.¹⁸¹ In addition, trial docket pressures could result in perceived or actual settlement coercion.¹⁸² Moreover, the demeanor of judges may reflect their opinions about what the trial outcome should be and can influence jurors’ verdicts.¹⁸³ One study found that mock jurors’ verdicts tended to be in the direction of the judge’s views of whether the defendant should be found guilty or not guilty, even when those expectations were communicated only via non-verbal cues during the reading of jury instructions.¹⁸⁴ Thus, jury trials are not immune from concerns about the potential for bias resulting from settlement conferences with the judge assigned to the case.

¹⁷⁷ BRAZIL, *supra* note 14, at 66, 85.

¹⁷⁸ PROVINE, *supra* note 127, at 28.

¹⁷⁹ Wall & Rude, *supra* note 128, at 235.

¹⁸⁰ *Id.* at 238.

¹⁸¹ See Cratsley, *supra* note 13, at 588–89; Killefer, *supra* note 3, at 19; Tornquist, *supra* note 63, at 760, 771; Wistrich et al., *supra* note 124, at 1325.

¹⁸² See Sander, *supra* note 63, at 11 n.1.

¹⁸³ See Cratsley, *supra* note 13, at 589.

¹⁸⁴ Allen J. Hart, *Naturally Occurring Expectation Effects*, 68 J. PERSONALITY & SOC. PSYCH. 109, 109, 111 (1995). Mock jurors viewed a 30-minute trial video, followed by a video of a judge reading jury instructions. The study used videos of several judges reading jury instructions in actual trials, none of which were the cases the jurors saw, so that jurors and judges were not reacting to the same case. The judges had been asked what they thought the trial outcome should be before the juries in those cases had rendered their verdicts. *Id.* at 110–11. Although the magnitude of the effect was relatively small in this study, it could be much larger in an actual trial, where there would be many opportunities for the judges’ views to be communicated to the jury. *Id.* at 113.

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Some commentators maintain that it would not be necessary to ban judges from conducting settlement conferences in cases assigned to them if explicit ethical standards and formal, written guidelines were created for judicial settlement conferences.¹⁸⁵ Regardless of the strictness of the standards developed and how scrupulously judges followed them, this approach does not address the concerns and problems that arise from the underlying structure of having the same person in the role of settlement facilitator and decisionmaker. Other commentators suggest that judges should conduct settlement conferences in cases assigned to them only if the parties consent.¹⁸⁶ However, just as lawyers have concerns about possible negative consequences or punishment for not settling at the conference, they might be reluctant not to consent out of fear of offending or angering the judge who will try the case.¹⁸⁷

Alternatively, some commentators propose that judges should not make any decisions in the case after conducting a settlement conference, without the consent of the parties.¹⁸⁸ Lawyers might be hesitant not to consent out of concern about offending the judge and facing negative consequences in future cases. Other commentators suggest that judges should consider recusal if they feel their impartiality might be in question following the settlement conference.¹⁸⁹ Although these proposals to change judges after the settlement

¹⁸⁵ See, e.g., Parness, *supra* note 25, at 1908; Robinson, *supra* note 1, at 380.

¹⁸⁶ See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.6, cmt. 2 (listing “whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions” as “[a]mong the factors that a judge should consider when deciding upon an appropriate settlement practice for a case”); TRIAL PRACTICE STANDARDS, *supra* note 124, § 23(c)(ii) & cmts.; Cratsley, *supra* note 13, at 586; Killefer, *supra* note 3, at 18; Resnik, *supra* note 1, at 641 n.187; see also Robinson, *supra* note 1, at 344 n.55 (reporting that a majority of California judges sitting in civil cases thought that civil or family law judges should be allowed to conduct settlement conferences for cases assigned to them for trial if the parties agree).

¹⁸⁷ See, e.g., Killefer, *supra* note 3, at 20, 22; Cratsley, *supra* note 13, at 592. There also are potential logistical difficulties associated with getting all parties to agree. See, e.g., Cratsley, *supra* note 13, at 592.

¹⁸⁸ This already is the practice in some courts. See *supra* note 29; see also, e.g., Phillips, *supra* note 124, at 101 (finding that 68% of surveyed commercial arbitrators and mediators thought that a neutral could agree to serve as both mediator and arbitrator if the parties consented in writing, were represented by competent counsel, and themselves were sophisticated).

¹⁸⁹ See, e.g., Robinson, *supra* note 1, at 362–63; see also MODEL CODE OF JUDICIAL CONDUCT, *supra* note 72, R. 2.11(A) (“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned”). *Id.* R. 2.6, cmt. 3 (noting that the judge “should consider whether disqualification may be appropriate . . . when information obtained during settlement discussions could influence

conference could reduce concerns regarding the appearance of impropriety at trial, they would not enhance settlement discussions because the parties would not be assured, at the time of the conference, that a different judge would be conducting the trial. Thus, unless there were a uniform policy that cases that do not settle always are turned over to a different judge after the settlement conference, parties are likely to feel the safest course is to assume that the same judge will try the case and to act accordingly during the conference. And because settlement conferences often are held late in the case, there would be additional scheduling, logistical, and administrative problems associated with finding a new trial judge at the last minute if that were not a standard practice.¹⁹⁰

B. Court-Connected Mediation: Staff or Volunteer Mediators?

Lawyers in the present study rated the staff mediator model more favorably than the volunteer mediation model on all but two dimensions, on which they rated the two models similarly. These findings are consistent with commentators' views that the staff mediator model can provide higher quality mediation services than the volunteer mediation model. This higher quality is due to the fact that courts typically require their staff mediators to have more mediation training and experience, and therefore the court is better able to monitor and exercise quality control over staff mediators than volunteer mediators.¹⁹¹ In addition, the fact that the court is using its resources to pay for staff mediators might inspire greater confidence in and respect for staff mediation, whereas volunteer mediation might be seen as simply an inexpensive way for the court to reduce its caseload.¹⁹²

The largest difference in lawyers' ratings of the two court-connected mediation models in the present study was in the mediators' ability to devote sufficient time to fully explore settlement. Lawyers viewed staff mediators as being able to devote much more time to exploring settlement than volunteer mediators, and also as responding more timely to parties' needs.¹⁹³ In

a judge's decision making during trial"); CODE OF CONDUCT FOR UNITED STATES JUDGES, *supra* note 115, Canon 3C(1).

¹⁹⁰ See Cratsley, *supra* note 13, at 588; Parness, *supra* note 25, at 1904-05; Ravindra, *supra* note 39, at 301; Baer, *supra* note 8, at 149.

¹⁹¹ See, e.g., Brazil, *supra* note 6, at 783, 803-05, 808; COLE ET AL., *supra* note 2, § 6.12; McAdoo & Welsh, *supra* note 6, at 22.

¹⁹² See Brazil, *supra* note 6, at 750-60, 808. This might be especially likely when volunteer mediation is offered only during Settlement Weeks rather than on a continuous basis.

¹⁹³ See *supra* notes 74, 78 and accompanying text.

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general, staff mediators are likely to be seen as being able to devote more time and attention to settlement discussions and as generally being more available for follow-up conversations or additional mediation sessions than volunteer mediators because staff mediators devote most or all of their work time to mediation rather than to a litigation practice or other job. The differences in lawyers' views of the availability of staff and volunteer mediators might be smaller in courts where the sessions in the two models are scheduled for similar amounts of time and where volunteer mediation is ongoing rather than part of infrequent Settlement Week events.

Being able to devote enough time to fully explore settlement and responding timely to the parties' needs are likely to contribute to a quality process and to parties' views that the process is fair for several reasons. First, parties who feel that they have had the chance to fully express their views and tell their side of the dispute and who feel that the neutral has given thorough consideration to all relevant information tend to feel that the process is fair.¹⁹⁴ Second, allocating enough time and responding timely to parties' needs is likely to contribute to parties' sense that the neutral and the court view their dispute as important and deserving of serious consideration and respectful treatment,¹⁹⁵ which would also lead parties to feel that the process is fair.¹⁹⁶ Third, settlement procedures for which inadequate time is allocated might lead parties to feel pressured to settle before they have fully explored the issues and options.¹⁹⁷

In the present study, staff mediators also were seen as incorporating clients more meaningfully into the settlement process and as providing more useful input to clients in considering settlement.¹⁹⁸ Incorporating parties into the settlement process in a meaningful way is likely to contribute to the parties feeling that the process is fair because it would provide them with a greater opportunity to tell their views and to have input into the outcome, and would give them the sense that the neutral valued their participation and understood and considered what they had to say.¹⁹⁹ In addition, staff mediators were seen as having more credibility and as being more helpful in

¹⁹⁴ See LIND & TYLER, *supra* note 54, at 101–06; Tyler & Lind, *supra* note 54, at 75–77; Welsh, *supra* note 121, at 820–23; Wissler, *supra* note 121, at 344–46; Wissler, *Representation*, *supra* note 121, at 449–51.

¹⁹⁵ See, e.g., Brazil, *supra* note 6, at 756.

¹⁹⁶ See LIND & TYLER, *supra* note 54, at 214, 216; Tyler & Lind, *supra* note 54, at 75–76; Wissler, *supra* note 121, at 345.

¹⁹⁷ See also John Lande, *How Will Lawyers and Mediation Practices Transform Each Other?*, 24 FLA. ST. L. REV. 839, 877 (1997).

¹⁹⁸ See *supra* notes 80, 97 and accompanying text.

¹⁹⁹ See *supra* notes 188–90 and accompanying text.

managing difficult clients than were volunteer mediators in the present study.²⁰⁰ These and other differences probably contributed to lawyers' views that staff mediators in the present study left clients feeling better served regardless of outcome and made better use of the parties' resources than did volunteer mediators.²⁰¹

The preceding set of differences in lawyers' ratings of the staff and volunteer mediation models is likely to largely reflect inherent differences between the two models: the more stringent hiring requirements for staff mediators, the greater mediation experience and skills they acquire as the result of devoting their work life to mediation, and the greater presumptive status and respect they have by virtue of their position with the court.²⁰² The size of the differences might be smaller in courts in which the volunteer mediators work on a more frequent basis and in which the two models allocate the same amount of time to mediation sessions and give parties the same degree of choice in the use of mediation and its timing. And the pattern of findings might be different if the staff mediators were retired judges or magistrate judges rather than lawyers.

Although the differences in ratings of bias were small in the present study,²⁰³ they are consistent with there being less basis for questioning the predispositions and motives of staff mediators vetted and employed by the court than volunteer mediators with an active litigation practice.²⁰⁴ Lawyers in the present study did not rate these two mediation models differently in terms of their allowing the candid and full exploration of settlement without concerns of negative consequences or prejudice to ongoing litigation. Thus, lawyers did not appear to see the fact that staff mediators are court employees as increasing these risks. These findings might be different, however, in courts in which the staff mediators are retired judges or magistrate judges.

Commentators have proposed several potential advantages of volunteer mediation that were not addressed in the present study. Because relying on volunteers would reduce the cost of the mediation program to the court, the court would be able to have more mediators.²⁰⁵ A larger number of mediators would permit the mediation program to handle a larger volume of cases.²⁰⁶ In

²⁰⁰ See *supra* notes 90, 98 and accompanying text.

²⁰¹ See *supra* notes 102, 105 and accompanying text.

²⁰² See *supra* notes 48, 95.

²⁰³ See *supra* note 69 and accompanying text.

²⁰⁴ See *supra* note 70.

²⁰⁵ See, e.g., McAdoo & Welsh, *supra* note 6, at 22.

²⁰⁶ Brazil, *supra* note 6, at 763, 809; McCrory, *supra* note 6, at 851.

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addition, a larger number of mediators would increase the diversity among the mediators in terms of process skills, substantive expertise, gender, and ethnicity, which would enable the mediation program to better meet the varied needs of litigants.²⁰⁷

C. Staff Mediation or Settlement Conferences with Judges Not Assigned to the Case?

On issues of central importance to process quality and fairness, lawyers in the present study rated mediation with staff mediators more favorably than settlement conferences conducted by judges not assigned to the case. Lawyers thought that staff mediators allowed a more candid and full exploration of settlement without concerns of negative consequences or prejudice to ongoing litigation and were less biased than were judges not assigned to the case.²⁰⁸ Staff mediators have no decisionmaking authority, whereas judges not assigned to the case might make non-substantive decisions in the instant case or substantive decisions in future cases involving the lawyers or the parties. Accordingly, lawyers might fear that judges who are not assigned to the case could be influenced by information that they learned during the settlement conference.²⁰⁹

Or lawyers might be concerned that judges not assigned to the case would be more likely than staff mediators to share information or impressions about the case with the trial judge, thereby affecting the trial judge's decisions. Indeed, rationales underlying policies involving mediation confidentiality and limiting communication between mediators and the court include enhancing settlement discussions, preventing pressure to settle in order to avoid a bad report to the court, and protecting the integrity of the trial process and the impartiality of the judge from the perception that information revealed in mediation was subsequently used to decide the case.²¹⁰ Although to date there is a lack of empirical evidence that these

²⁰⁷ McAdoo & Welsh, *supra* note 6, at 21; McCrory, *supra* note 6, at 836–36, 840–42; Brazil, *supra* note 6, at 743, 763, 772–73, 779–80 (noting that courts will vary on which aspects of diversity they view as important).

²⁰⁸ See *supra* notes 58, 61, 69 and accompanying text.

²⁰⁹ See also NIEMIC ET AL., *supra* note 3, at 79; Sander, *supra* note 63, at 22; *supra* notes 128, 138–40 and accompanying text.

²¹⁰ See, e.g., STANDARDS FOR MEDIATION PROGRAMS, *supra* note 113, Standards 8.1.e, 9.1, 12.1, & cmts.; MODEL RULE FOR NEUTRALS, *supra* note 115, R. 4.5.2 cmt. 2; UMA, *supra* note 115, Prefatory Note at 9, §§ 4–8 & cmts.; THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURT 16 (1991)

provisions have these effects,²¹¹ lawyers appear to believe that they do and are likely to act in accord with their beliefs. The candid and full exploration of settlement contributes to the fairness and quality of the settlement process.²¹²

Lawyers in the present study also rated staff mediators more favorably than judges not assigned to the case on other dimensions that are likely to contribute to process quality and fairness. Staff mediators were seen as being more able to devote sufficient time to settlement and responding more timely to parties' needs.²¹³ This might reflect that staff mediation is more likely to involve longer sessions and that staff mediators are more likely to be available for follow-up because they have fewer competing work duties.²¹⁴ In addition, staff mediators were seen as incorporating clients more meaningfully into the settlement process than were judges not assigned to the case.²¹⁵ This might reflect differences in the typical roles of the parties and the approach of the neutrals in mediation versus settlement conferences,²¹⁶ or that shorter sessions in settlement conferences constrained party involvement. More time devoted to the settlement procedure and greater party involvement are likely to enhance the quality of the settlement process and participants' perceptions of its fairness.²¹⁷

In the present study, the two dimensions on which judges not assigned to the case were rated more favorably than staff mediators were having more credibility regarding settlement considerations and being more helpful in managing difficult parties.²¹⁸ Lawyers rated the two types of neutrals similarly in terms of the usefulness of their input to clients and whether they left clients feeling well-served regardless of the outcome. Nonetheless,

(recommending that mediator "reports to the trier of fact" not be used because they are a form of settlement coercion, increasing strategic behavior and reducing candid communication); NIEMIC ET AL., *supra* note 3, at 76, 93 n.242; Deason, *supra* note 65, at 1388; McAdoo & Welsh, *supra* note 6, at 34.

²¹¹ See, e.g., Deason, *supra* note 65, at 1389; Scott H. Hughes, *A Closer Look: The Case for a Mediation Confidentiality Privilege Still Has Not Been Made*, 5 DISP. RESOL. MAG. 14 (1998); Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 33 (2003).

²¹² See *supra* notes 152-54 and accompanying text.

²¹³ See *supra* notes 74, 78 and accompanying text.

²¹⁴ See, e.g., Brazil, *supra* note 6, at 786-87.

²¹⁵ See *supra* note 80 and accompanying text.

²¹⁶ See *supra* notes 83-86 and accompanying text.

²¹⁷ See *supra* notes 188-92 and accompanying text.

²¹⁸ See *supra* notes 91, 99 and accompanying text.

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lawyers thought that mediation with staff mediators made better use of client resources, and they had a strong overall preference for mediation with staff mediators compared to settlement conferences with judges not assigned to the case.²¹⁹ This suggests that lawyers did not see credibility, help with difficult clients, or other attributes of settlement conferences with judges not assigned to the case as so important as to outweigh the advantages of mediation with staff mediators.

The extent to which lawyers view these two models as different is likely to vary across courts. Views of settlement conferences with judges not assigned to the case are likely to depend on the nature of their decisionmaking authority, their relationship to the trial judge, and the proportion of their workload devoted to settlement conferences. Views of staff mediation are likely to vary depending on whether the mediators are lawyers or are retired judges or magistrate judges. And if lawyers' primary experience with the staff mediation model in the present study was with the single staff mediator in the district in which the survey was conducted, views of staff mediation based on different staff mediators might be different. In addition, views of both settlement procedures might depend on whether there are explicit provisions regarding confidentiality or limitations on what may be reported to the trial judge.

Some commentators have suggested that requiring judges to have training in mediation skills and education in how the mediator's role differs from that of the judge would improve the quality of judicial settlement conferences.²²⁰ Although such training might alter the way judges conduct the settlement conference, it would not address the fundamental structural differences between judges and staff mediators, including differences in their decisionmaking roles and proximity to the trial judge.

V. CONCLUSIONS AND ADDITIONAL CONSIDERATIONS

Courts interested in facilitating settlement in general civil cases have several models of judicial settlement conferences and court-connected mediation among which to choose, including settlement conferences with judges assigned to the case or with judges not assigned to the case, and mediation with staff mediators or with volunteer mediators. Lawyers'

²¹⁹ See *supra* notes 105, 108 and accompanying text.

²²⁰ See, e.g., Otis & Reiter, *supra* note 8, at 367; Alfini, *supra* note 1, at 14; Cratsley, *supra* note 13, at 586–87 (proposing that judges who undertake settlement activity be required to have the same training and follow the same ethical standards as mediators in their court).

perceptions of and relative preferences among the models are one source of information about the settlement procedure models.

Comparing the two judicial settlement conference models, lawyers in the present study thought that settlement conferences with judges not assigned to the case raised substantially fewer concerns than settlement conferences with judges assigned to the case, while having most of the same benefits. Lawyers saw settlement conferences with judges not assigned to the case as involving far less bias and risk of prejudice to ongoing litigation, allowing much greater openness and time needed to fully explore settlement, and incorporating parties more meaningfully and leaving them feeling better served. Although judges assigned to the case were seen as having greater credibility than judges not assigned to the case, lawyers did not rate the two types of judges differently in the usefulness of their input or their helpfulness with difficult parties. Overall, lawyers preferred settlement conferences with judges not assigned to the case.

Comparing the two court-connected mediation models, lawyers in the present study viewed staff mediation more favorably than volunteer mediation overall and on all but two dimensions, permitting candid and full discussions without negative consequences or prejudice, on which the two models were rated similarly. Among the larger differences were that lawyers saw staff mediators as having more time to fully explore settlement and responding more timely to parties' needs, more meaningfully incorporating parties into the process, and providing more useful and credible input regarding settlement considerations than volunteer mediators.

Finally, comparing mediation with staff mediators and settlement conferences with judges not assigned to the case, lawyers in the present study ranked staff mediation higher in terms of overall preference. Mediation with staff mediators was seen as raising fewer concerns about bias and prejudice to ongoing litigation, allowing greater openness and time needed to fully explore settlement, incorporating the parties more meaningfully into the settlement process and responding more timely to their needs, and making better use of parties' resources than settlement conferences with judges not assigned to the case. Staff mediators, however, were seen as having less credibility and being less helpful in managing difficult clients than judges not assigned to the case. In sum, compared to each of the other court-connected settlement procedure models, lawyers viewed mediation with staff mediators more favorably on a majority of dimensions and gave staff mediation by far the highest proportion of first-place overall preference rankings and the fewest last-place rankings.

Lawyers' ratings of the settlement procedure models are likely to be influenced by the inherent characteristics of the models, how they are

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implemented, and the context in which they operate in particular courts, including their caseload, resources, and degree of court oversight.²²¹ Although the lawyers responding to the present survey were likely to have experience with some of the settlement procedure models in a number of federal district courts, it is possible that they had most of their experience with some of the models in the district in which the survey was conducted. Except for the Settlement Week context of volunteer mediation and the use of a single staff mediator in the present district, the structure of the settlement procedure models in this district was consistent with their basic underlying structures and was largely typical of their implementation in other courts. Thus, the present findings are likely to be generally representative of lawyers' views of the settlement procedure models. To have more confidence that the present findings reflect lawyers' perceptions of the settlement procedure models themselves and not the specific contexts in which they operated, however, future studies need to examine these models in other district courts as well as in a number of state courts.

Many of the differences in lawyers' views of the settlement procedure models in the present study are consistent with inherent structural differences among the models, however, and would likely be seen in other contexts regardless of how the models are implemented. For instance, the fact that judges assigned to the case are the only neutrals who have a substantive decisionmaking role in the instant case would likely lead lawyers in all courts to view settlement conferences with judges assigned to the case as constraining settlement discussions, creating settlement pressures, and raising questions about bias and the propriety of subsequent decisions more so than the other settlement procedure models. In addition, because judges not assigned to the case typically differ from mediators in their decisionmaking authority and have greater opportunities for communication with the trial judge, lawyers would be likely to see settlement conferences with judges not assigned to the case as allowing less openness and raising more concerns about bias and prejudice to ongoing litigation. And because staff mediators' sole or primary occupation and work duties involve mediation and they have a great deal of experience facilitating settlement, lawyers would be likely to see staff mediators as being able to devote more time and attention to cases and to incorporating parties more meaningfully than either volunteer mediators or judges. Finally, because volunteer mediators are less closely linked to the court and generally have less stringent selection criteria for serving as a neutral, they would be less likely to have the presumptive status

²²¹ See, e.g., McEwen, *supra* note 13, at 83–92; Brazil, *supra* note 6, at 720, 723–24, 799.

and respect that judges and staff mediators have, and thus would tend to be seen as having less credibility, providing less useful input, and being less helpful in managing difficult parties.

Different courts might reach different overall conclusions about which settlement procedures to provide, depending on their goals for the procedures and the circumstances under which they operate, such as the types of cases, characteristics of the parties, budget constraints, and docket pressures.²²² These considerations might lead different courts to view the relative importance of these eleven dimensions differently or to assign greater weight to dimensions not addressed in the present study. Thus, “we cannot assume that conclusions that are valid for one program, in one specific setting, will be valid for programs in . . . different settings.”²²³

Similarly, lawyers and parties in different cases might reach different conclusions about the pros and cons of the different settlement procedures depending on the parties’ goals and priorities, the nature of the case, and the barriers to settlement.²²⁴ In some cases, the perceived benefits of the judge’s credibility regarding settlement considerations might override concerns about the possible prejudicial effect of information revealed during the settlement conference. Whether in a given case it is important to have a “predictive” versus a “problem solving” settlement process might determine, for instance, whether the parties would prefer a settlement conference with a judge not assigned to the case or mediation with a staff mediator.²²⁵

The findings of a study in a district where parties could choose among several ADR procedures illustrate this point.²²⁶ Over eighty percent of lawyers whose clients had chosen mediation with a volunteer mediator rather than another ADR procedure said that mediation’s greater flexibility was an important reason for their choice of procedure, while almost two-thirds of lawyers whose clients had selected an early settlement conference with a magistrate judge said that getting a judge’s opinion before trial was an

²²² See, e.g., Brazil, *supra* note 6, at 718–20; McAdoo & Welsh, *supra* note 6, at 2.

²²³ Brazil, *supra* note 6, at 720.

²²⁴ See, e.g., McCrory, *supra* note 6, at 830; Pyle, *supra* note 26, at 22; Sheppard, *supra* note 54, at 172–74; Sternlight, *supra* note 83, at 297–349; MEDIATION QUALITY, *supra* note 96, at 12–13.

²²⁵ See, e.g., McEwen, *supra* note 86, at 78–79, 82–84. Moreover, parties might find different procedures useful at different points in the case.

²²⁶ STIENSTRA ET AL., *supra* note 15, at 178–80 (reporting findings from the Multi-Option Program in the United States District Court for the Northern District of California).

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important reason for their choice.²²⁷ In addition, although there were more similarities than differences in their ratings of how the procedure had been helpful, lawyers who used mediation were more likely to say that the procedure had been helpful by allowing parties to tell their story, whereas lawyers who used a settlement conference with a magistrate judge were more likely to say that the procedure had been helpful by clarifying liability issues.²²⁸ These findings suggest that it might be useful for courts to offer more than one type of settlement procedure from which parties can choose.²²⁹

Finally, the present study provides only one source of information for assessing the settlement procedure models, namely lawyers' perceptions of the extent to which the models possess certain characteristics and their overall preferences among the models. To provide a more comprehensive picture of the settlement procedure models, future studies should ascertain lawyers' views on a broader set of characteristics. Courts might also want information on other aspects of the settlement procedure models, such as the likelihood or quality of settlements.²³⁰ One study found that ADR programs that were more tightly integrated within the court and that were overseen more closely by the court had a higher rate of settlement,²³¹ suggesting that the closer court connection of the staff mediation model relative to the volunteer mediation model might be associated with a higher settlement rate. Another study found no differences between mediation with volunteer mediators and early settlement conferences with magistrate judges in the likelihood the case settled or in lawyers' perceptions of the fairness of the procedure or their satisfaction with the outcome.²³²

²²⁷ *Id.* at 188. Over eighty percent of the lawyers whose clients chose early neutral evaluation said that having an expert predict the likely outcome was an important reason for choosing that procedure. *Id.*

²²⁸ *Id.* at 205. These reasons were ranked as the fourth most important way in which the respective procedures had been helpful. *Id.*

²²⁹ See generally, e.g., ROBERT A. LOWE & SUSAN L. KEILITZ, MIDDLESEX MULTI-DOOR COURTHOUSE EVALUATION PROJECT, FINAL REPORT (1992); Kenneth K. Stuart & Cynthia A. Savage, *The Multi-Door Courthouse: How It's Working*, 26 COLO. LAW. 13 (1997).

²³⁰ Parties list settlement as a goal they want to achieve in mediation and generally have more favorable assessments of the mediator and the mediation process when the case settles. See, e.g., RELIS, *supra* note 96, at 130–31; Wissler, *supra* note 48, at 661 n.77.

²³¹ Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?*, 62 DISP. RESOL. J. 42, 51–53 (2007).

²³² STIENSTRA ET AL., *supra* note 15, at 198–207. Because the parties or judges had selected the procedure they thought would be best suited for the case, however, it is

Most importantly, future research needs to explore parties' perceptions of the settlement procedure models. Parties might rate the characteristics of the models differently than their lawyers do. While this might not happen for all dimensions,²³³ parties might be especially likely to have different views of whether they were incorporated meaningfully into the settlement process by the neutral.²³⁴ In addition, parties also might have different overall preferences among the settlement procedure models than their lawyers do,²³⁵ as they are likely to have different goals for the settlement procedure.²³⁶ In making preference judgments, parties are likely to assign different importance to some dimensions²³⁷ and to take different dimensions into consideration.²³⁸ Parties might see fewer differences among the settlement procedure models than lawyers do, particularly between the models within

unclear whether there were in fact no underlying differences in the effectiveness of the procedures or whether the procedures had been correctly matched with the cases.

²³³ See, e.g., Brazil, *supra* note 84, at 231 n.7 (reporting that parties and lawyers had similar ratings of whether the mediator applied too little or too much pressure).

²³⁴ See, e.g., Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 702, 725-27, 733-34, 742-43 (2007) (finding that medical malpractice lawyers seldom understood their client's objectives and concerns, and these misconceptions led them to think it was not necessary to discuss emotions and non-monetary concerns and settlement options in mediation); Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 877-82 (2008) (illustrating differences between lawyers and clients in their understanding of the problem and how those problem definitions affected the lawyers' approaches to mediation and their clients' participation in sessions).

²³⁵ For instance, studies find that although most parties and lawyers think the mediation process is fair, parties' ratings tend to be lower than their lawyers' ratings. See, e.g., Brazil, *supra* note 84, at 231 n.7; Wissler, *supra* note 48, at 663. But see RELIS, *supra* note 96, at 202 (finding a mixed picture regarding parties' and lawyers' views of whether they liked the mediator as a person and liked the mediator's performance).

²³⁶ See, e.g., RELIS, *supra* note 96, at 131-36, 153, 165-67 (reporting that lawyers focused on legal goals and parties focused on psychological goals, and although both viewed resolution as an important mediation aim, parties rated other goals as much more important than lawyers did).

²³⁷ See, e.g., MEDIATION QUALITY, *supra* note 96, at 15 (finding that parties were more likely than lawyers to think it was inappropriate for mediators to state their opinions about settlement terms); RELIS, *supra* note 96, at 207 (reporting that the mediator's credibility was important for lawyers but not parties).

²³⁸ See, e.g., RELIS, *supra* note 96, at 224, 233 (reporting that lawyers stressed the mediator's strategic and tactical assistance, while parties emphasized the mediator's human attributes and the opportunity to express themselves).

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each type of procedure.²³⁹ It is also possible that lawyers' and parties' ratings might not substantially diverge, as lawyers are likely to shape their clients' expectations of the settlement procedures.²⁴⁰ Because most parties would not have experience with different settlement procedure models, a different methodology would have to be used than the one used in the present study. Despite the potential difficulties associated with conducting such a study, obtaining parties' views would help to inform courts about what type or model of settlement procedures they should offer.²⁴¹

²³⁹ See, e.g., RELIS, *supra* note 96, at 202, 233 (reporting that most parties liked the mediator style they experienced and perceived almost anything the mediator did favorably).

²⁴⁰ See, e.g., Sternlight, *supra* note 83, at 318.

²⁴¹ See, e.g., Brazil, *supra* note 6, at 738 ("When we design court-sponsored ADR programs our greatest concern should be to preserve . . . and to increase . . . the people's respect for, confidence in, and gratitude toward our system of justice.").

